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IN THE

Supreme Court of the United States

SENAIT KIDANE TESFAMICHAEL and
DAWIT TESSEMA-DAMTE,
Petitioners,

v.

ALBERTO GONZALES, U.S. ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Tellingly, the government does not even attempt to defend the rationale for the court of appeals' decision. Instead, the government proposes other, inherently inconsistent rationales—including a "firm resettlement" rationale that was itself rejected by the Fifth Circuit—to try to sustain the outcome below and avoid the question presented in the petition. Nothing in the government's submission undermines the compelling need for review.

1. What *actually happened* to petitioner Senait Kidane Tesfamichael ("Senait") in Ethiopia and Eritrea is undisputed. She was born and raised in Ethiopia, and was both an Ethiopian national and a citizen until Ethiopia stripped her of both her nationality and her citizenship and forcibly expelled her to Eritrea in 2000. Neither the government nor the court below disputes that what happened to Senait at the hands of the Ethiopian government constitutes persecution, *if* Ethiopia is deemed to be the proper "test" country for Senait's asylum claim. Accordingly, this case squarely presents the question set forth in the petition for certiorari: "[w]hether a person is a 'national'—and therefore a 'refugee' potentially eligible for asylum—of a country that has stripped her of citizenship and expelled her from the country where she was born and raised?"

The government tries to avoid this question by asserting that Senait is an Eritrean citizen and therefore her asylum claim was properly analyzed by the courts below by reference to her experience in Eritrea. Opp. at 4. The government cites two grounds for this assertion: Senait's alleged "admission" in her asylum application, and action taken by the *Ethiopian government* based on Senait's act of voting in the 1993 Ethiopian referendum on the status of Eritrea. Opp. at 7.

Those are small horses soon curried. Senait could not and did not make herself an Eritrean citizen by anything she wrote

on her asylum application. The record unambiguously establishes that Eritrea considered her a refugee and nothing more. In fact, Eritrea required her to carry a card reflecting her refugee status at all times. Pet. App. 62a. Of course, the Ethiopian government was in no position to confer Eritrean citizenship on Senait or anyone else. The fact that the Ethiopian government decided, many years after Senait voted in the election, to strip Ethiopian citizenship from Ethiopian nationals who voted in the 1993 referendum could neither make Senait an Eritrean citizen nor defeat her right to claim asylum based on the wrongs perpetrated against her by the Ethiopian government. Indeed, that citizenship-stripping campaign forms the very basis for Senait's asylum claim.

2. The Fifth Circuit held that Senait's asylum claim was properly analyzed by reference to Eritrea because Senait was a "stateless" person who "last habitually resided" in Eritrea. Pet. App. 6a–8a. The government not only fails to defend the Fifth Circuit's approach to this case, it quite obviously disagrees with it:

> Tesfamichael . . . is not stateless. Consequently, the correct statutory analysis required a consideration of her country of "nationality" under Section 1101(a)(42)(A), rather than an analysis under the statelessness rubric of where she "last habitually resided." Opp. at 11.

In disavowing the Fifth Circuit's approach—and substituting yet another, even more strained rationale for denying Senait's asylum claim—the government continues a frustrating and disturbing trend in this case. The administrative courts reasoned that Senait was not entitled to asylum because she was supposedly "firmly resettled" in Eritrea (a determination that necessarily presupposed that she was a national of a country other than Eritrea). Pet. App. 37a–38a.[1] The

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[1] The oral decision of the Immigration Judge is provided in Appendix A to this reply. This decision was not included in the appendix to the petition for certiorari because generally the federal courts review the

Fifth Circuit preliminarily concluded (in the decision granting petitioners a stay of removal) that "the IJ and BIA seem to have erred" in concluding that Senait was firmly resettled in Eritrea, because, as the court said, "the evidence appears to be that she had no intention of ever remaining in Eritrea and only stayed there as long as was necessary to arrange onward travel." Pet. App. 32a–33a. Upon full review, the Fifth Circuit merits panel obviously was unable to affirm the administrative courts' firm resettlement determination and so it resorted to the "last habitual residence" approach that the government now disavows. Attempting nonetheless to defend the outcome below, the government now offers its own justification for why Senait's asylum application should have been denied, and it also tries to resurrect the "firm resettlement" theory that the court of appeals plainly rejected.

3. In the government's view, all roads lead to Eritrea for Senait: Her asylum claim was properly analyzed by reference to Eritrea, either because she is an Eritrea national or because she is stateless. *See* Opp. at 9 ("Thus, whether Tesfamichael is properly considered to have been an Eritrean national or stateless—and whether she is regarded as having firmly resettled in Eritrea or rather as having last habitually resided there—her asylum claim was correctly considered to be with respect to Eritrea.").

But that begs the very question presented: whether Senait is an Ethiopian "refugee" based on the undisputed fact that, until Ethiopia forcibly stripped her of her Ethiopian citizenship and expelled her from Ethiopia on account of her Eritrean ancestry, Senait was an Ethiopian "national." This is an important question for U.S. asylum law. Suppose, for example, that Lebanon decided to strip all citizens of Pales-

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decision of the BIA, not the IJ. *Secaida-Rosales v. INS*, 331 F.3d 297, 305 (2d Cir. 2003). The Appendix also contains, at B and C, two reports that Petitioners submitted in support of their asylum claims at their asylum hearing. These reports are both a part of the record in this matter.

tinian ancestry of their citizenship and expel them to Israel. Would those Lebanese be permitted to seek asylum using Lebanon as their test country? Or suppose the new Iraqi government decided to expel to Turkey all Iraqis of Kurdish ethnicity who expressed support in some form or another for an independent Kurdistan? Would those Iraqis be permitted to seek asylum using Iraq as the test country? *Haile v. Gonzales*, 421 F.3d 493 (7th Cir. 2005), answers that question in the affirmative. In this case, however, the Fifth Circuit said no. The Court's intervention is needed to resolve this important question that is at the very core of our asylum law.

ARGUMENT

I. The Record Establishes That Senait Is Not A Citizen Of Eritrea.

The government's opposition contends that either Senait is an Eritrean national or she was "firmly resettled" in Eritrea, Opp. at 7–8, and that, either way, her asylum claim was properly resolved by reference to Eritrea. *Id.*; *see also* Opp. at 11. The government ignores the glaring inconsistency between its two theories: if Senait is an Eritrean citizen or national, she cannot possibly have been "firmly resettled" in Eritrea, because firm resettlement presumes a finding of refugee status based on persecution in *another* country. *See Dhoumo v. BIA*, 416 F.3d 172, 174–76 (2d Cir. 2005); Pet. at 2–3. More importantly, there simply is no support in the record for the claim that Senait is an Eritrean citizen.

A. There Is No Evidence That *Eritrea* Considers Senait To Be An Eritrean Citizen.

There is not a scintilla of evidence in this record that *Eritrea* deems Senait to be a citizen Eritrea.[2] It is irrelevant

[2] For argument's sake, the discussion in the text indulges the assumption that it could ever be appropriate under our asylum laws to treat someone as a citizen of a country where such citizenship has been imposed

that *Ethiopia* may consider Senait to be an Eritrean citizen. Under both international and U.S. law, only a particular nation has the power to confer its citizenship. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS § 211 (2006) ("For purposes of international law, an individual has the nationality of a state that *confers* it . . . ." (emphasis added)); *Faddoul v. INS*, 37 F.3d 185, 189 (5th Cir. 1994) ("The decision to bestow or deny citizenship is deeply-rooted in national sovereignty and must be left to the individual nation's discretion."); *De Souza v. INS*, 999 F.2d 1156, 1159 (7th Cir. 1993) (same).

Senait testified that Eritrea provided her with a document that read "Eritrean Refugee Relief Commission" on the outside. Pet. App. 61a–62a, 65a. She was not provided with an Eritrean passport or a national identity card. *Id.* Further, Senait was denied an exit visa from Eritrea when she requested one. Pet. App. 4a.

Senait's testimony is corroborated by other materials in the record in this case. For example, one report confirms:

> **The legal status of Ethiopian residents of Eritrea who had not sought Eritrean nationality at the time of the war's outbreak does not appear to be in dispute. The Eritrean government as a rule considered them as aliens**. It did not automatically issue the Eritrean national identity card or passport to these Ethiopians nor did it recruit them for employment reserved for nationals. Ethiopians were also not called up for military service in Eritrea. For the purposes of residency and

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on a person against her will. *But see* RESTATEMENT (THIRD) FOREIGN RELATIONS § 211, Reporters' Note 2 (2006) ("The United States has taken the position that it is a violation of international law for a state to impose its nationality upon a person after birth without that person's consent."); *see also id.* at Comment d ("A state is not required to recognize a nationality imposed by another state on an individual against his or her will on the basis of some link, e.g., . . . having some particular ethnic or national origin").

> departure procedures, the Eritrean government continued to deal with Ethiopian nationals under the normal institutions and procedures governing aliens residing in the country, i.e., *they were required to acquire residency permits and obtain exit visas to leave the country.*

Reply App. 50a–51a (emphasis added).

B. Senait Did Not—And, Legally, Could Not—"Admit" That She Is An Eritrean Citizen.

The government latches on to the Fifth Circuit's suggestion that by identifying Eritrea as her "Present Nationality (Citizenship)" on her asylum application, Senait "admitted" that she was an Eritrean citizen. Pet. App. 7a; Opp. 4. The government's reliance on this aspect of Senait's asylum application is misplaced for several reasons.

First, even if Senait *believed* she was an Eritrean citizen when she completed her asylum application, that would not be determinative of her actual legal citizenship or her asylum claim. Any such subjective belief could not make Senait an Eritrea citizen; when *Eritrea* did not consider her to be one. Moreover, in a variety of contexts, courts have held that statements made on administrative applications are not "admissions," but rather merely evidence. *See Moerman v. Zipco*, 302 F. Supp. 439, 448 (E.D.N.Y.1969) (finding that statements made on an SEC form were not admissions, but merely evidence); *Granzow v. Eagle Food Centers, Inc.*, 27 F. Supp. 2d 1105, 1107–08, 1107 n.4 (N.D. Ill. 1998) (finding that a statement in an EEOC filing was not a judicial admission, and that no precedent was presented to show otherwise). In the asylum context, courts do not hold applicants strictly to that which is contained in their asylum applications. In *Hartooni v. INS*, the Ninth Circuit remanded a case where the BIA used an entry on the asylum application to determine the outcome of the proceeding, much as the government is trying to do here. 21 F.3d 336, 343 (9th Cir. 1994) ("The entire substance of the Board's stated reasons for

failing to credit Hartooni amounted to a single check mark in the Asylum application filled out by a fourteen-year old girl with limited English proficiency.") Indeed, courts consistently recognize the difficult circumstances surrounding the early stages of applying for asylum and the resulting likelihood of inaccurate and inconsistent information that can only be clarified through record evidence and witness testimony. *See Balasubramanrim v. INS*, 143 F.3d 157, 161 (3d Cir. 1998) (cautioning against placing too much weight on inconsistencies between an asylum affidavit and subsequent testimony before an Immigration Judge); *see Zubeda v. Ashcroft*, 333 F.3d 463, 467 (3d Cir. 2003) ("Caution is required because of the numerous factors that might make it difficult for an alien to articulate his/her circumstances with the degree of consistency one might expect from someone who is neither burdened with the language difficulties, nor haunted by the traumatic memories that may hamper communication between a government agent in an asylum interview and an asylum seeker."); *Aguilera-Cota v. INA*, 914 F.2d 1375, 1382–83 (9th Cir. 1990) (stating that the circumstances surrounding the application process do not lend themselves to a perfectly complete and comprehensive recitation of an applicant's asylum claim and holding an applicant to such a standard is both unrealistic and unfair).

Second, the government's almost myopic focus on Senait's asylum application causes it to ignore the overwhelming evidence establishing that she is not an Eritrean citizen. As the document it issued to Senait shows, Eritrea regarded Senait as an Ethiopian *refugee*, not as an Eritrean citizen. Pet. App. 61a–62a. The government's focus on the application defeats the entire purpose of the asylum hearing. *See Liti v. Gonzales*, 411 F.3d 631, 639 (6th Cir. 2005) ("The purpose of holding a removal hearing is not simply to reiterate the statements made in the asylum application, but rather to allow an alien 'to present evidence on the alien's own behalf

including to elaborate on the generalized claims made in the application itself." (citing 8 U.S.C. § 1229a(b) (4)(B))).

Third, the government ignores that Senait also listed "Ethiopia" as her "Nationality at Birth" on her asylum application. Pet. App. 70a; *see also* Pet. 14. The various boxes checked by Senait on her asylum application are consistent with her understanding of what actually happened to her: Ethiopia told her she was no longer an Ethiopian citizen, that she would now be considered an Eritrean citizen, and expelled her to Eritrea. In the light of these events, Senait understandably believed, when completing the application, that her "*Present* Nationality (Citizenship)" was that of an Eritrean. Senait's belief, however, does not end the inquiry regarding her legal status.[3]

C. Nor Does Senait's Vote In The 1993 Referendum Establish That She Is An Eritrean Citizen.

When Senait voted in the Eritrean referendum election in 1993 she was not aware that Ethiopia would decide—years later—to treat the mere act of voting as a renunciation of her Ethiopian nationality or citizenship. Pet. App. 53a, 65a–66a. The only question posed to those Ethiopians like Senait who participated in the referendum was: "Do you approve Eritrea to become an independent and sovereign state?" Reply App. 67a.

Once again, the record unambiguously corroborates Senait's testimony. It was not until 1998—after hostilities broke out

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[3] A fundamental problem with the Fifth Circuit's reliance on Senait's purported admission and the government's echoing of that flawed reasoning is that the subject was not covered during the administrative proceedings. There is no testimony from petitioner explaining why she completed the application the way she did, because the Department of Homeland Security opposed asylum for petitioner solely on the basis of firm resettlement, which, as noted above, *presumed* Senait was a national of some country other than Eritrea, i.e., Ethiopia.

between Ethiopia and Eritrea—that the government of Ethiopia took the position that Ethiopians who voted in the 1993 referendum were to be deemed Eritrean citizens:

> Following the outbreak of conflict between Ethiopia and Eritrea in May 1998, the question of who voted in the 1993 referendum became a critical issue in the expulsion process and in the mutual recriminations between the two states—though it has not been an issue in the previous five years. One of the questions most frequently asked of potential deportees was "Did you vote in the 1993 referendum?" An affirmative answer was sufficient basis for expulsion in the eyes of Ethiopian authorities.

Reply App. 67a–68a.

II. Review Is Warranted To Resolve The Conflict Between The Seventh And Fifth Circuits On The Interpretation Of "Nationality."

In *Haile*, 421 F.3d at 493, the Seventh Circuit addressed the question of "whether Ethiopia has the sovereign right to discriminate against ethnic Eritreans by stripping them of their citizenship." *Id.* at 494. The court drew a "fundamental distinction between *denying* someone citizenship and *divesting* someone of citizenship" and said it was aware of no case or principle that "suggests that a government has the sovereign right to strip citizenship from a class of persons based on their ethnicity." *Id.* at 496 (emphasis in original). The court said "[i]t is arguable that such a program of denationalization and deportation is in fact a particularly acute form of persecution." *Id.* The court's disposition was to remand the case to the BIA for further proceedings. *Id.* at 496–97.

Contrary to the government's suggestion, *see* Opp. at 9–10, neither the language in the Seventh Circuit opinion ("it is arguable . . .") nor its disposition of the case eliminates the conflict between the *Haile* and this case. Here, the Fifth

Circuit asserted that what happened to Senait in Ethiopia simply "is irrelevant under the statute." Pet. App. 7a. The government echoes that point. *See* Opp. at 9. As we have demonstrated, none of the various justifications tendered for the assertion—"firm resettlement," "last habitual residence," etc.—hold up. As important, the court of appeals and the government both ignore the obvious: Senait was sent to Eritrea against her will, and would never have been there at all but for the persecution by Ethiopia that forms the basis for her asylum claim.

Indeed, Senait's asylum claim is much stronger than that of the petitioners in *Haile*. The petitioners in *Haile* both left Ethiopia after the outbreak of the war between Eritrea and Ethiopia in 1998. *Haile*, 421 F.3d at 494–95. Neither of them was officially stripped of Ethiopian citizenship; rather, they claimed that if they were returned to Ethiopia that country would not recognize them as citizens anymore based on the policy adopted by the Ethiopian government with respect to citizens of Eritrean ethnicity. *Id.* Neither of the petitioners in *Haile* faced what Senait did: she was refused renewal of her Ethiopian identity card and, later, forcibly expelled from Ethiopia based on her ethnicity. She was taken from her home by Ethiopian government forces, held in a refugee camp, and forced to walk through a minefield into Eritrea. Once in Eritrea, she was given a refugee card, and was unable to leave that country legally. It is both ironic and inconsistent for petitioners in *Haile* to be afforded a chance for asylum based on what happened to them in Ethiopia and for Senait to be told that what happened to her in Ethiopia is, simply, "irrelevant."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 11, 2007

APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Los Fresnos, Texas

[Filed July 15, 2004]

File Nos.: A 97 746 470-471

In the Matters of

SENAIT KIDANE TESFAMICHAEL,
DAWIT TESSEMA-DAMTE,
Respondents,

IN REMOVAL PROCEEDINGS

CHARGES:	Section 212(a)(6)(A)(i)—Immigration and Nationality Act
APPLICATIONS:	Asylum, Section 208—Immigration and Nationality Act; Withholding of Removal—Section 241(b)(3)—Immigration and Nationality Act; Withholding of Removal pursuant to the Convention Against Torture; Voluntary Departure—Section 240B—Immigration and Nationality Act

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ORAL DECISION OF THE IMMIGRATION JUDGE

The cases of Senait Kidane Tesfamichael and Dawit Tessema-Damte have been consolidated with respect to being heard together and also having one record of proceeding for both cases. Counsel for respondents and the respondents themselves have referred to the respondents as Senait and Dawit. In order to differentiate between the two respondents, the Court will call them by those names. Where the Court is referring to both respondents in this decision, the Court will either refer to them as Senait and Dawit or refer to them as respondents.

In each of these cases the Department of Homeland Security issued a Notice to Appear on March 31, 2004 and properly served it upon both respondents. A Notice to Appear was issued in each case (Exhibit 1 and Exhibit 1A). In the case of Senait the Notice to Appear alleges that she is not a citizen or national of the United States and that she is a native of Ethiopia and a citizen of Eritrea who arrived in the United States at or near Hidalgo, Texas on or about March 27, 2004 without being admitted or paroled after inspection by an immigration officer. The Notice to Appear in her case charges that she is subject to removal from the United States under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act) in that she is an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General. At a removal hearing Senait admitted all four of the allegations in the Notice to Appear and also admitted that she is subject to removal as charged.

In the case of Dawit the Notice to Appear alleges that he is not a citizen or national of the United States and that he is a native and citizen of Ethiopia who arrived in the United States at or near Hidalgo, Texas on or about March 27, 2004 without being admitted or paroled after inspection by an immigration officer. The Notice to Appear in his case also charges that he is subject to removal under Section 212(a)(6)(A)(i) of the Act. Dawit also admitted all four of the allegations of fact in the Notice to Appear and also admitted that he is subject to removal as charged.

Based upon the pleadings of the respondents the Court concludes that removability has been established in each case.

With respect to country selection if removal is ordered, Senait first selected Canada as the country for removal if removal is ordered. However, since Senait does not have any immigration status in Canada and has not previously lived in Canada according to her testimony, the Court did not permit her to select Canada as the country for removal if removal is ordered because Canada is a country that is contiguous to the United States. See Section 241(b)(2)(B) of the Act. Senait then selected Australia as the country for removal if removal is ordered. In her case the Court designated Eritrea as the country for removal if removal is ordered and Australia would not accept her for removal.

In the case of Dawit he selected Australia as the country for removal if removal is ordered. The Court designated his native country of Ethiopia as the country for removal if removal is ordered and if Australia would not accept him for removal.

Both respondents have applied to this Court for asylum under Section 208 of the Act, withholding of removal under Section 241(b)(3) of the Act and withholding of removal pursuant to the Convention Against Torture. Each respondent has filed an application for asylum and withholding of

removal in his or her own right on Form 1-589 (Exhibit 2 and Exhibit 2A). Those applications were filed with the Court on May 18, 2004. Also the respondents contend that they are married to each other and they have included each other on their applications for asylum and withholding of removal as derivative applicants as well.

As required by the applicable regulations, the Court has sent a copy of the application for asylum and withholding of removal in each to the United States Department of State to request an advisory opinion. In each case the Department of State responded by stating that it would not be commenting on either application (Exhibit 3 and Exhibit 3A).

The respondents have presented documentation to the Court in support of their applications for relief from removal. Those documents were admitted into the record and considered by the Court (Exhibit 4 and Group Exhibit 5). The hearing on the merits with respect to respondents's applications for asylum and withholding of removal was held on July 14, 2004.

TESTIMONY OF SENAIT KIDANE TESFAMICHAEL

Senait testified that she was born in Addis Ababa, Ethiopia. Her application for asylum and withholding of removal shows that she was born on September 11, 1976. With respect to the dates mentioned in this decision, the record shows that there is a difference between the Ethiopian calendar and the calendar that is used in the United States. Both respondents testified that any dates that they would be providing in this proceeding are dates in the calendar used in the United States. Therefore, those are the dates that will be utilized in this decision.

Senait testified that both of her parents were born in Eritrea and that they moved to Addis Ababa before she was born. Senait has five siblings. She testified that she is married to Dawit and they do not have any children. She testified that

she started living with Dawit in 1997 and that they considered themselves to be married. She also testified that they are considered to be married under Ethiopian law even though they did not register their marriage with the government and do not have any marriage certificate. She testified that she lived with Dawit in Ethiopia for one year from 1997 until 1998 at which time Dawit left Ethiopia to go to South Africa.

Senait testified that Ethiopia started expelling ethnic Eritreans in 1998 because there was a war going on at that time between Ethiopia and Eritrea. Senait believed at that time that her and Dawit would not be able to continue living together in Ethiopia because she is Eritrean and he is Ethiopian and she feared that she would be deported to Eritrea. She testified that Dawit is Ethiopian and he cannot come to Eritrea. Therefore, Senait testified that as a result she and Dawit decided to leave Ethiopia together to go to Kenya because she believed that that was their only choice in order to be able to live together.

On their way to Kenya they were arrested when they tried to leave Ethiopia. Senait testified that she was arrested because she did not have a passport or an ID card in Ethiopia and therefore she was taken off the bus on which they were passengers. She testified that Dawit followed her off the bus and told the police officers that he was her husband. Senait testified that she previously had an Ethiopian ID card but that she was not able to renew it in 1997 because she was Eritrean.

Senait testified that she is a citizen of the country of Eritrea. It was her testimony that she had a card to vote in the referendum for Eritrean independence at the time when that vote took place. She testified that by filling out that card for the referendum she became a citizen of Eritrea. It was her testimony that she remains a citizen of Eritrea at this time. The record in this case shows by the documents presented by the respondent that the referendum for Eritrean independence

took place in 1993. The documentation also shows that registration to vote in the 1993 referendum was tied to verification of Eritrean nationality and establishment of nationality and registration to vote took place in tandem. To be eligible to vote a person had to be an Eritrean as defined by the nationality law of Eritrea. (See Group Exhibit 5, Item 6, pages 8-9).

Senait testified that after taking Eritrean citizenship by filling out the card for the referendum she was a citizen at that time of both Eritrea and Ethiopia. However, the documentation presented by respondent calls that testimony into question. A document presented by the respondent (Group Exhibit 5, Item 12, at page 7) states that Ethiopian law was clear that those who took up the option of Eritrean citizenship could not then have a dual nationality; they could not retain their Ethiopian citizenship.

Senait tesified that when she and Dawit attempted to leave Ethiopia in 1998 to go to Kenya, she knew that she was not permitted to leave Ethiopia because she could not cross the border without a passport and an ID card. She testified that Dawit would have been permitted to leave at that time because he did have an Ethiopian passport and ID card. Senati testified that both she and Dawit were arrested and interrogated by the Ethiopian police at the time that they were attempting to leave Ethiopia in 1998 to go to Kenya. They advised the police officers that they were married. Senait was in jail pursuant to that arrest for one month and two weeks. She was released from jail when Dawit paid a bribe to one of the guards at the jail. Senait testified that after she and Dawit were released from jail, Dawit decided that he was going to leave Ethiopia because the police were bothering him. Dawit at that time told Senait that he was going to get settled and then he would send for her. She testified that when he left Ethiopia and she remained in Ethiopia in 1998 she missed him a great deal because she loves him and he is her husband.

Senait testified that Ethiopia started expelling ethnic Eritreans because of the war between Ethiopia and Eritrea that began in 1998. She testified that the government began to expel her family. When Dawit left Ethiopia in 1998, Senait went to live with her parents and her siblings in Addis Ababa. She testified at first her mother and one of her sisters was deported to Eritrea. It was her testimony that one night the police came and took them to a detention center where they were then subsequently deported to Eritrea after being detained for three days. Senait testified that one week later her brother Daniel was taken to a detention center by the Ethiopian government and expelled to Eritrea. She testified that six months later her sister Judit and her father were taken by the Ethiopian government and they were also deported to Eritrea. It was her testimony that thereafter she and her sister Netsenet hid from the police in order to avoid being deported. She testified that Netsenet had obtained a diversity visa to immigrate to the United States and Netsenet in 1999 was eventually able to come to the United States to immigrate pursuant to that visa. Netsenet is living in the United States at the present time.

Senait testified that after Netsenet left Ethiopia Senait was the only member of her immediate family who remained in Ethiopia and she was in Ethiopia thereafter for one year until she was taken by the police to a detention center and deported to Eritrea. She testified that she was deported to Eritrea with other persons. It was her testimony that when she was deported into Eritrea the Eritrean border guards took the deportees to the Red Cross where they were put on a bus and taken to another town. They were held at a large camp where the deported persons were registered. The respondent gave a woman at the camp her aunt's phone number. Senait's aunt called Senait's mother who was living in the capital of Eritrea which is Asmara. Senait's mother and aunt came to visit her at the camp. After three days being at the camp Senait was given an ID card and she was then taken to Asmara. She

testified that all of the persons who were taken to Asmara were allowed to go live with their families. Senait was reunited with her family in Asmara, where her parents and siblings were living. She testified, however, that her brothers were not at home in Asmara because they were in the Eritrean military.

Senait testified that Dawit was not allowed to be with her in Eritrea and that she missed him. She testified that not having Dawit there was the worst part of being in Eritrea. It was her testimony that the government of Eritrea would not allow Dawit to visit her in Eritrea because the government does not allow, Ethiopians to visit persons in Eritrea. Senait sent Dawit a letter telling him that she was in Eritrea. This letter was sent to Dawit in South Africa. The record shows that Senait was deported to Eritrea in June of 2000.

Senait lived in Eritrea from June of 2000 to the end of 2002. She was given an ID card to live in Eritrea. As stated, she was a citizen of Eritrea. When Senait was in Eritrea she worked in that country for the Mobile Oil Company at a gas station working as a cashier.

Senait testified that while she was in Eritrea Dawit sent her a visa so that she could go to South Africa. However, she testified that she still needed to obtain an exit visa from the government of Eritrea in order to be allowed to leave that country. It was her testimony that she was not able to get an exit visa. She testified that she asked for an exit visa to leave Eritrea at the end of 2002, but that it was denied because nobody who was in the age group of 18 years of age to 40 years of age was allowed to leave the country at that time. It was her testimony that because she could not obtain the exit visa, she decided to leave Eritrea illegally. Senait left Eritrea illegally at the end of 2002 by traveling through Sudan. She testified that she got across the border into Sudan by paying money to be taken by car. She was able to arrive in South Africa where she started living with Dawit. She testified that

she was very happy to be with him again. In South Africa, Senait was able to obtain an ID card allowing her to move around. She remained in South Africa for one year. It was her testimony that she left South Africa because a person broke into her home, hit her on the head and had a knife. This person was attempting to rob her. She testified that she left South Africa to find a place to be safe with Dawit.

Senait testified that she is afraid to return to Eritrea because she left the country illegally and that she cannot live in Eritrea with Dawit and she cannot live without her husband. It is her testimony that she cannot return to Ethiopia. She testified that Dawit cannot ever join her in Eritrea and that they cannot be reunited in either Ethiopia or Eritrea. It was her testimony that the only way that they could live together would be to live in a country other than Ethiopia or Eritrea.

Senait testified that prior to the attempt by her and Dawit to leave Ethiopia to go to Kenya in 1998 neither of them had any problem with the government of Ethiopia. Senait testified that she is not considered by the government of Ethiopia to be a citizen of Ethiopia any longer because the government took it away from her.

Senait testified that she had problems with government employees when she was working at the gas station in Eritrea. She testified that when a government employee would come to the station and she would require them to show a card, they would become mad at her and they would tell her that she should be sent back to Ethiopia.

Senait testified that when she was in Eritrea Dawit never made a request to the Eritrean government to be able to go to Eritrea to live with her. She testified that he cannot ask for such permission because he is Ethiopian. She testified that she does not know of any Ethiopians who asked to live in Eritrea while she was in the country. She also testified that while in Eritrea she did not know any married couple where

one person was from Ethiopia and the other from Eritrea. She also testified that after being deported from Ethiopia, she did not request from the Ethiopian government to be allowed to return there to live in Ethiopia and that she does not know of anybody who made such a request.

Senait testified that when she and Dawit were attempting to leave Ethiopia in 1998. The Ethiopian government was not going to allow her to leave Ethiopia legally to go to Kenya. She testified that she was planning to exit Ethiopia at that time illegally by not going through the inspection area.

Senait also testified that when she voted in the referendum for Eritrean independence in 1993 only Eritreans could vote. She testified that she wanted to be a citizen of Eritrea. It was her testimony that she was not expelled from Ethiopia for voting in that referendum.

TESTIMONY OF DAWIT TESSEMA-DAMTE

Dawit testified that he was born in Addis Ababa, Ethiopia. He testified that he is married to Senait and they were married in 1997. It was his testimony that they did not register their marriage with the Ethiopian government, but that it is still considered to be a valid marriage in Ethiopia. He testified that his parents still live in Addis Ababa, Ethiopia. He also has a sister who lives in Addis Ababa. His brother lives in Australia where he moved in 1992.

Dawit testified that he and Senait decided to live together in 1997 and they began living together at that time. He testified that they were married in 1997 in Addis Ababa although they did not have a formal marriage ceremony because they did not have enough money to do so. He testified that they held themselves out to friends and other persons as being married, and that it is common in Ethiopia for persons to live together and say they are married without any formal marriage ceremony. He testified that he does not have any children.

Dawit testified that in 1998 he and Senait decided to leave Ethiopia because the Ethiopian government was expelling Eritrean citizens and that he and Senait did not want to be separated. It was his testimony that at that time Ethiopia was expelling Eritrea and Eritrea was expelling Ethiopians. Dawit testified that he did not think that he could live in Eritrea at that time because the Eritrean government was expelling Ethiopians. He testified that he and Senait decided to leave Ethiopia because they did not want to be separated and that they tried to leave for Kenya traveling there by bus.

Dawit testified that at a town called Hagra Mariam the bus was inspected by police officers in Ethiopia and everybody was asked for ID. He showed the officers his identification. However, Senait did not have an identification card. She was then asked to come off the bus with the officers and she did so. Dawit followed them. They were taken to the police station. At the police station they were put in separate rooms and interrogated. Dawit testified that he was asked by the police officers at the police station whether he was smuggling Eritreans out of Ethiopia and he stated that he was not a smuggler. He testified in this proceeding that he was not smuggling Eritreans out of Ethiopia, but that his intention was to go to Kenya with Senait. He testified that the police officers thought that he was smuggling Eritreans because a lot of Eritreans leave the country through Kenya. Dawit was formally charged with the crime of smuggling Eritreans. He testified that he understands that the possible sentence for such a crime is 4-6 years in prison if he is found guilty. Dawit was in jail for one month at the Hagra Mariam police station awaiting trial, although he did not go to court during that one month period. He testified that he was not physically abused while he was detained although the conditions of confinement were miserable and he was not allowed to contact his family. He also testified that he was interrogated repeatedly being asked how many people he was smuggling and how much money he was getting from the smuggling. He also testified'

that he could hear the police officers yelling from other rooms and other persons screaming. He testified that he was afraid of being physically beaten. However, he was not physically harmed during his detention.

Dawit testified that when one of his fellow detainees was released from jail pursuant to Dawit's request that this person contacted Dawit's mother. Dawit's mother then went to the police station where he was being detained and she paid a bond for Dawit to be released. Dawit was released at that time on bond after being in jail for that one month period. Dawit testified that as a condition of his release from jail he had to return to Addis Ababa and also follow up with his criminal charges. He was told that he had to check at the police station to see when his case would be heard. It was his testimony that his case was not called at any time when he was in Ethiopia. He testified that he was afraid because he had been charged with something that he didn't do. He also testified that he did not think he could win the criminal case because the police had charged him and the police officers were going to come and testify. Dawit testified that therefore he didn't think he could get a fair trial because his wife is Eritrean and the government of Ethiopia believed according to Dawit that he was in opposition to the government because they believe he was helping Eritreans to leave Ethiopia and that he is married to an Eritrean. He also testified that the police officer's testimony at a trial is given the weight of the testimony of three persons who aren't police officers.

Dawit testified that after he got out of jail, one week later he was able to get Senait released from jail. He testified that he did that by paying money to bribe a police officer. He testified that he was able to get Senait released from jail without any criminal charges. After Senait was released from jail, Dawit and Senait went back to their home in Addis Ababa. Dawit testified that four days later while he was taking clothes to be washed at a laundry, police officer

stopped him. He was asked to show his identification card, which he did. The officer also asked to check his bag, which they did and found only dirty clothes. He was told that he had to show a receipt after going to the laundry, which he did, and he was allowed to go back to his home.

Dawit testified that eight days later the police again stopped him and checked his bag when he was going to the stadium. He testified that they found only clothes in the bag and then he was allowed to go on. He testified that he had never been stopped by the police before these two incidents and that he believed this was happening because he had been charged with smuggling Eritreans. It was his testimony that he was afraid because he could not move around freely without being stopped by the police.

Dawit testified that he never went to court in Ethiopia for the charge of smuggling Eritreans because he believed he would not get equal justice for the reasons stated above. He testified that two weeks after Senait was released from jail he left Ethiopia. He testified that Senait did not come with him. It was his testimony that he was planning to send for Senait once he got settled and he told her that. He testified that he loves Senait and always wants to be with her.

Dawit testified that he left Ethiopia and crossed into Kenya where he remained for one week. He testified that at that time he had a brother in Kenya but his brother did not have a job. Therefore, Dawit decided to go South Africa, which he did in 1998 when he left Ethiopia. He testified that he was given a temporary permit to be in South Africa. With that permit he was allowed to be in South Africa temporarily, but he was not allowed to work or go to school. He testified that he earned money by selling things on the street. He testified, however, that he was not allowed by that permit to remain in South Africa indefinitely and he could not return to South Africa after leaving. Dawit testified that while in South Africa he applied for asylum in that country because if he returns to

Ethiopia he would not be able to live a peaceful life or have protection for himself. He testified that his application for asylum in South Africa was neither granted nor denied as it remained pending. He testified that while he was in South Africa he corresponded with Senait through letters. The first letter took 4-6 months because he did not have a stable address in South Africa as yet. Dawit testified that he found out that Senait had been deported to Eritrea because she wrote him a letter telling him that. He testified that a friend of Senait also wrote him a letter telling him about this.

Dawit testified that Senait came to South Africa in 2002. Dawit testified that he had negotiated with someone to get Senait a visa for South Africa, but it failed. He testified that Senait went to Sudan and then he was able to arrange for somebody to bring Senait to South Africa. He testified that in South Africa he and Senait had their own home and they told people that they were married. It was his testimony that he and Senait decided to leave South Africa in 2003 because someone came to rob their home and hit Senait during this robbery attempt. Dawit testified that they reported this incident to the police, but the police could not hold anybody at that time. He testified that he and Senait were afraid for their lives and decided to leave South Africa.

Dawit testified that he could never return to Ethiopia because he has a pending lawsuit there relating to the criminal charge. He also testified that Senait cannot go to Ethiopia with him. It was his testimony that he was afraid to return to Ethiopia because he would be detained there and Senait would not be able to join him. Dawit also testified that he could not live in Eritrea because Eritrea is deporting Ethiopians. He testified that he would be very sad if he could not live with Senait and that he would prefer not to live if he could not live with her.

Dawit testified that he does not believe that he could have lived in South Africa permanently because he cannot get

permanent residence there. He testified that he does not know anybody who obtained permanent residence in South Africa.

Dawit testified that when he was stopped by the police while going to the laundry in Addis Ababa after being released from jail there were a lot of other persons who were walking with bags on the street but they were not searched.

Dawit testified that he never requested of the Eritrean government to be allowed to live in Eritrea with Senait because he cannot do so. He testified that a lot of Ethiopian people are deported from Eritrea.

THE FINDINGS OF FACT AND CONCLUSION OF LAW

The regulatory provision at 8 C.F.R. 1208.13 establishes the applicable burden of proof in order to demonstrate eligibility for asylum under Section 208 of the Act. A respondent has the burden of proof to show that he or she is a refugee as defined in Section 101(a)(42) of the Act. The testimony of the asylum applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In order to show a well-founded fear of persecution the applicant must show that he or she has a fear of persecution in his or her country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion and that there is a reasonable possibility of suffering such persecution if he or she were to return to that country. The Board of Immigration Appeals has interpreted the term persecution to mean harm or suffering caused by the government of a country or by persons or an organization that the government is unable or unwilling to control.

The regulatory provision at 8 C.F.R. 1208.16(b) sets forth the applicable burden of proof to establish eligibility for

withholding of removal under Section 241(b)(3) of the Act. The burden of proof is on the applicant for withholding of removal under Section 241(b)(3) to establish that his or her life or freedom will be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. That standard has been held to mean that a respondent must show that it is more likely than not that he or she would be persecuted in a proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.

The regulatory provision at 8 C.F.R. 1208.16(c)(2) states that with respect to the application for withholding of removal pursuant to the Convention Against Torture the burden of proof is on the applicant to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The applicable definition of torture is found at 8 C.F.R. 1208.18(a). In pert and in part torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The regulation at 8 C.F.R. 1208.18(a)(3) states that "torture does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the option and purpose of the Convention Against Torture to prohibit torture."

The Court concludes that both respondents were credible witnesses in this removal proceeding. The testimony of each respondent was specific, forthright, internally consistent and essentially consistent with the testimony of the other respondent. Therefore, the Court concludes that the facts that they

presented should be relied on in making the Court's decision. However, that does not mean that the Court finds that what the respondents's subjectively believe is in each instance objectively reasonable. Further, the Court has considered the documentary evidence presented by the respondents.

The Court initially concludes that the respondents have not proven that they are considered to be married under the law of Ethiopia. The Board of Immigration Appeals has held that foreign law as a matter of fact could be proven by the party seeking to rely on it. *See Matter of Soleimani*, 20 I&N Dec. 99, 106 (BIA 1989). The respondents have not presented any documentary proof of Ethiopian law regarding common law or traditional marriage. The Court concludes that their testimony does not establish that they are married because they have not shown that they are experts in Ethiopian law.

This case must be considered in the context of the war that was fought between Ethiopia and Eritrea which began in May 1998. That war continued until the year 2000. The documentary evidence demonstrates that the war started in May of 1998. The negotiated end of the war occurred on December 12, 2000. However it appears from the documentary evidence that the actual fighting may have ended in August of 2000. The peace agreement, however, was not completed until December of 2000.

The Court concludes that Dawit did not suffer past persecution in Ethiopia for any reason. The Court concludes that his arrest in Ethiopia and his charge in a criminal proceeding of smuggling Eritreans is not persecution within the meaning of the Act. It is well established that prosecution for violating a country's travel laws is not persecution within the meaning of the Act where that prosecution is conducted in conformity with the normal criminal laws of the country and there is no excessive punishment based upon race, religion, nationality, membership in a particular social group, or political opinion. There is no such showing that Dawit would suffer any ex-

cessive punishment for any of those five reasons. Thus, the well settled law applies in this case that prosecution for violating a country's travel laws is not persecution within the meaning of the Act. *See Barreto-Claro v. US Attorney General*, 275 F.3d 1334 (11" Cir. 2001); *Matter of G-*, 20 I&N Dec. 764, 779 (BIA 1993) and cases cited therein.

According to Senait's testimony she was not permitted to leave Ethiopia at the time that she was trying to leave the country in 1998 because she did not have a passport or an Ethiopian identification card issued by the Ethiopian government. She testified that the government of Ethiopia would not let her renew her ID card in 1997. This may well have been because she was a citizen of Eritrea at that time. Further, Senait testified that she and Dawit tried to leave Ethiopia for Kenya in 1998 after Ethiopia started deporting ethnic Eritreans due to the ongoing war at that time between Ethiopia and Eritrea. Therefore, it may well have been that the Ethiopian government was not allowing citizens of Eritrea like Senait to leave Ethiopia at that time due to the fear of the Ethiopian government that such persons would go to Eritrea and join the military to fight against Ethiopia.

With respect to Dawit's arrest on the charge of smuggling Eritreans out of Ethiopia the record shows that he was charged formally with a crime in Ethiopia. He was placed in jail after being charged. He was then released on bond to await his court date. The possible prison sentence if found guilty was 4-6 years in prison. None of this establishes past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion or for any other reason.

Further, Dawit's testimony about being stopped by the police in Addis Ababa on two occasions after he was released from jail in 1998 also does not establish past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In fact, it was not

persecution for any reason. Even if it was done because he had been charged with the crime of smuggling Eritreans illegally out of Ethiopia or attempting to do so, it only shows that the government was watching him because he had been suspected of this criminal activity in Ethiopia. Further, at the time that he was stopped by the police, they only checked what was in his bag and then allowed him to go on his way when nothing unusual was found.

Dawit left Ethiopia in 1998 while he was free from jail on bond in the criminal proceeding. In fact it appears that he left Ethiopia for the reason that he did not want to appear at his criminal proceeding because he believed that he would not get a fair trial and that he might be convicted. There has been no objective evidence in the record, either through any testimony or any other evidence, that he would not have been given a fair trial in Ethiopia if he would have remained there as required and attended his court hearing. Further, it appears that Dawit left Ethiopia because the police were watching him and stopping him as he believed they were. It was clear that the police were stopping him. It is not clear that they were keeping surveillance on him. The record does not establish why they stopped him on those two occasions. As stated, even if they did stop him because they knew he had been suspected of criminal activity, that would not be persecution. In fact it appears that Dawit was doing what he was charged with doing when he and Senait were attempting to leave Ethiopia for Kenya in 1998. As Senait testified she did not have an Ethiopian passport or identification card that would allow her to leave Ethiopia for Kenya at that time in 1998. And she intended to leave Ethiopia illegally by not going through the inspection station at the border with Kenya.

The Court further concludes that Senait's deportation to Eritrea in June 2000 was not persecution of Dawit. Dawit and Senait were not living together at that time as Dawit had left Ethiopia in 1998 and had not returned to Ethiopia. There has

been no evidence presented to indicate that Senait's deportation to Eritrea was carried out in any way to punish Dawit for any rea Accordingly, the Court concludes that Dawit did not suf ast persecution in Ethiopia on account of race, religion, nationality, membership in a particular social group, or political opinion or for any other reason.

The Court further concludes that Dawit does not have a well-founded fear of persecution in Ethiopia if he is returned to Ethiopia at the present time. The record demonstrates that the only reasonable belief as to action that the government of Ethiopia would take against him if he were to return to Ethiopia would be to put him on trial for the criminal charge which had been brought against him previously for smuggling an Eritrean illegally out of Ethiopia. He also may be charged with the additional crime of not appearing at a court hearing in his criminal case as required. Neither of these actions would constitute persecution within the meaning of the Act. As discussed above, prosecution for violating a country's travel laws is not persecution within the meaning of the Act. Certainly it would not be persecution for a government to also prosecute a person for not appearing in court as required for a duly constituted criminal proceeding for which he was released on bond.

With respect to Senait, even if her deportation from Ethiopia to Eritrea is considered persecution on account of her Eritrean ethnicity or nationality, the Court concludes that she would not be eligible for asylum under Section 208 of the Act based upon such persecution because thereafter she became firmly resettled in Eritrea. Section 208(b)(2)(A)(VI) states in essence that asylum cannot be granted to an alien who was firmly resettled in another country prior to arriving in the United States. The record is clear that Senait was firmly resettled in Eritrea prior to coming to the United States. The applicable definition of firm resettlement is found at 8 C.F.R. 1208.15. It states in pert and in part that "an alien is con-

sidered to be firmly resettled if prior to arrival in the United States he or she entered into another country with or while in that country received an offer of permanent resident status, citizenship or some other type of permanent resettlement". In the present case, Senait was a citizen of Eritrea prior to leaving Ethiopia according to her own testimony. While in Eritrea she was recognized as a citizen of that country and she retains that citizenship to date. Further, the two exceptions to firm resettlement found at 8 C.F.R. 1208.15(a) and (b) do not apply to this case based upon the facts of this case. It cannot be said that she remained in Eritrea only as long as necessary to arrange onward travel and that she did not establish significant ties in that country. She remained in Eritrea for almost two and a half years. The record does show that Dawit was attempting to get her travel documentation so that she could leave to come to South Africa. Therefore, it may be argued that she remained in Eritrea only as long as was necessary to arrange onward travel. However, she did establish significant ties in that country. First of all, as stated, she is a citizen of Eritrea. Secondly, she lived in Eritrea with her parents and siblings. And she had employment in Eritrea with the Mobile Oil Company. Her application for asylum and withholding of removal (Exhibit 2) shows that she worked in that employment from the year 2000 to 2002. Further, the record shows that the conditions of her residence in Eritrea were not so substantially and consciously restricted by the authority of that country that she was not in fact resettled. Senait was permitted to live there as a citizen of Eritrea. She lived with her parents and siblings and had employment in that country. The record does not show that she was restricted in any way with respect to the conditions of her residence in that country as an Eritrean citizen. Accordingly, she was firmly resettled in Eritrea.

There is no evidence to demonstrate that Senait was persecuted in any way while she was in Eritrea by the Eritrean government or anybody else. Although there may have been

comments made to her while she was working at the gas station by government employees that she should return to Ethiopia when she asked them for cards that they were supposed to show. This certainly does not establish a persecution within the meaning of the Act. These persons were apparently just venting a frustration at her asking for these cards which they did not want to show apparently. These persons took no action against the respondent and didn't threaten that they were going to take any action.

Senait testified that she is afraid that she would be prosecuted in Eritrea for leaving Eritrea without an exit visa. For the same reasons as discussed above, this would not be persecution within the meaning of the Act because it would be prosecution for violating a country's travel laws. There is no showing that Senait would receive any excessive punishment for this or any such prosecution would be based upon her race, religion, nationality, membership in a particular social group, or political opinion. In fact, Senait testified that she could not obtain an exit visa to leave Eritrea in 2002 because nobody at that time who was in the age group of 18 years to 40 years was able to leave the country. That testimony is supported by the respondent's documentary evidence. (See Group Exhibit 5, Item 4, page 10). That documents shows that those persons of that age group were not allowed to leave Eritrea because that was the age that persons were required to perform national service to the government of Eritrea. Accordingly, respondent's fear of being prosecuted for leaving Eritrea illegally without an exit visa is not a fear of persecution within the meaning of the Act. *See Barreto-Claro v. US Attorney General, supra; Matter of G-, supra.*

Both respondents argue that if they are returned to their respective countries of citizenship, they would be persecuted by not being able to live together as husband and wife because Senait cannot live in Ethiopia and Dawit cannot live in Eritrea. The Court need not determine if this would be

persecution within the meaning of the Act because the facts of their case do not establish that the respondents's fear that this would occur is objectively reasonable. The record may well lead to a reasonable belief that Senait would not be permitted to reenter Ethiopia. Even if this is considered to be persecution of Dawit and Senait, the record does not establish that they cannot avoid this persecution by going to live in Eritrea together. In other words, the record does not establish that Dawit would not be allowed to enter Eritrea to live with Senait as husband and wife. The records shows that after Dawit learned that Senait was living in Eritrea, Dawit never applied to the Eritrean government to live there with his wife who is a citizen of Eritrea. Dawit testified that he could not live in Eritrea because Eritrea is deporting Ethiopians. Senait testified that Dawit cannot come to live with her in Eritrea because he is Ethiopian. If Senait means by this testimony that he would not be allowed as a matter of Eritrean law to enter Eritrea to live with her as husband and wife, respondents have not proven this. As discussed above, foreign law is a question of fact to be proven by the party relying on it. Respondents have not submitted evidence showing any such law in Eritrea.

The documentary evidence presented by the respondents show that Ethiopians are at the present time permitted to live in Eritrea and that Ethiopians leaving Eritrea at the present time for Ethiopia are doing so voluntarily. The documentary evidence in the form of the United States Department of State Country Report on Human Rights Practices for Eritrea for 2002 which was published on March 31, 2003 (Group Exhibit 5, Item 4) states at page 2 that after the end of the war with Ethiopia in August 2000 forced mass deportations stopped. That was reiterated in that same report at page 3 where it states the deportation stopped in August 2000 after the end of the war with Ethiopia. It was referring in that paragraph to the deportation of Ethiopians from Eritrea to Ethiopia. Further, that same report at page 5 states that the

government of Eritrea generally did not use exile as a means of political control and the law has no provisions concerning exile. It goes on to state that the government continued to repatriate Ethiopians to Ethiopia and that by December 2001 the government had repatriated more than 21,000 Ethiopians to Ethiopia with all of those persons being repatriated voluntarily and with the participation of the International Committee of the Red Cross. Further, in that same report at page 7 it states that the situation for Ethiopians in Eritrea improved somewhat. It states that Ethiopians generally were able to renew residence permits in Eritrea without difficulty during the year. This demonstrates that Ethiopians were being permitted to live in Eritrea with residence permits during 2001 and 2002. Further, in that same report at page 10 it states that during the year 2002 the government of Eritrea repatriated approximately 1,500 Ethiopians to Ethiopia. It states that they were repatriated voluntarily and with International Committee of the Red Cross participation. It further states that an estimated 20,000 to 25,000 Ethiopians remained in Eritrea at the end of 2002.

In light of this documentary evidence the record does not show that Dawit would not be permitted to enter Eritrea to live there with Senait who is a citizen of Eritrea. As discussed above, Dawit never made that request even though he knew that Senait was living in Eritrea.

The Court further concludes that the respondents have not shown that if Dawit is permitted to live in Eritrea with Senait that he would have a well-founded fear of persecution in Eritrea. The documentary evidence when taken as a whole shows that Dawit would have a reasonable belief that he would be discriminated against and possibly harassed in Eritrea due to his Ethiopian nationality, but the evidence does not show that he would have a reasonable fear of persecution in Eritrea at the present time. The Court recognizes that the documentary evidence shows that Ethiopians do not live in

Eritrea at the present time without difficulty. The us Department of State Country Report for Eritrea for the year 2002 (Group Exhibit 5, Item 4 at page 7) does state that Ethiopians living in Eritrea continue to be unable to obtain business licenses, driving licenses or leases 'and many continue to lose their jobs because of their nationality. It states that these hardships encouraged many Ethiopians to leave the country during 2001. It further states that during the year conditions remained difficult for Ethiopians living in the country, but most who wanted to leave had already done so. The Court concludes that the record as stated above does not show that Dawit would have a reasonable fear of being persecuted in Eritrea at the present time if he were to go to live there with Senait. The record does not show that Dawit would be unable to obtain any employment in Eritrea. Further, the record shows that Senait is able to work in Eritrea and was in fact employed there. There is no showing that if they lived together in Eritrea that they would be destitute. A case as cited by the respondents shows that harsh treatment does not necessarily rise to the level of persecution within the meaning of the Act. *See Mikhael v. INS*, 115 F.3d 299, 304, note 4 (5th Cir. 1997); *see* also *Barretto-Claro v. U.S. Attorney General, supra*, at 1340. In that case where an individual fell out of favor with the government of Cuba suffered employment discrimination, lost his job as a taxi driver and was forced to take menial work, the Court held that this type of employment discrimination which stops short of depriving an individual of a means of earning a living does not constitute persecution. As stated the record does not show that Dawit would be unable to obtain any work in Eritrea. Further, his wife who he would be living with in Eritrea, Senait, could obtain work as well. Accordingly, the record does not show that the respondents would not be able to live with each other as husband and wife in Eritrea at the present time. The Court concludes that neither respondent has established a reasonable belief that they would not be able to live together in

Eritrea at the present time. Further, the respondents have not established a reasonable fear that Dawit would be persecuted in Eritrea if he were to go to live there at the present time with Senait.

Accordingly, based upon all of the above, the Court concludes that the respondents's applications for asylum under Section 208 of the Act must be denied. Since the respondents have not established eligibility for the lesser standard of proof required for asylum, they also cannot establish eligibility for withholding of removal under Section 241(b)(3) of the Act. Thus, the respondents have not shown that it is more likely than not that they would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion if they are removed to the country designated by the Court in either case. Accordingly, their applications for withholding of removal under Section 241(b)(3) of the Act must also be denied.

The Court further concludes that the respondents have not shown that they're eligible for withholding of removal pursuant to the Convention Against Torture. Neither respondent has proven that it is more likely than not that they would be tortured in any country for any reason. They did not suffer any torture in the past and there is nothing in the record to indicate that it is more likely than not that they would be tortured for any reason in any country in the future. Accordingly, their application for withholding of removal pursuant to the Convention Against Torture must also be denied.

It does not appear that the respondents have officially requested voluntary departure in the alternative. However, it appears that even if they did, the respondents would not be eligible for voluntary departure at this stage of the proceedings. Their application would have to be considered under Section 240B(b)(1) of the Act, which is voluntary departure at the conclusion of proceedings; *see* 8 C.F.R. 1240.26(b) and (c). The respondents are not eligible for voluntary departure

under Section 240B(b)(1) of the Act as they have not shown that they have been physically present in the United States for a period of at least one year immediately preceding the date the Notice to Appear was served under Section 239(a) of the Act. In these cases the Notice to Appear was served on March 31, 2004 in each case, which is four days after they entered the United States. Accordingly, they are not eligible for voluntary departure.

ORDER

SENAIT KIDANE TESFAMICHAEL, A 97 740 470

WHEREFORE IN the case of Senait Kidane Tesfamichael IT IS HEREBY ORDERED that respondent's applications for asylum under Section 208 of the Act, withholding of removal under Section 241(b)(3) of the Act, withholding of removal pursuant to the Convention Against Torture and voluntary departure under Section 240B of the Act be denied.

IT IS FURTHER ORDERED that respondent be deported from the United States to Australia.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept that respondent into its territory or fails to advise the Attorney General within 30 days following original inquiry whether it will or will not accept that respondent into its territory, that respondent shall be removed to Eritrea.

DAWIT TESSEMA-DAMTE, A 97 746 471

IT IS FURTHER ORDERED that in the case of the respondent Dawit Tessema-Damte that the applications for asylum under Section 208 of the Act, withholding of removal under Section 241(b)(3) of the Act, withholding of removal pursuant to the Convention Against Torture and voluntary departure under Section 240B of the Act be denied.

IT IS FURTHER ORDERED that respondent be removed from the United States to Australia pursuant to the charge of removability in the Notice to Appear.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept that respondent into its territory or fails to advise the Attorney General within 30 days following original inquiry whether it will or will not accept that respondent into its territory, that respondent shall be removed to Ethiopia.

DATED July 15, 2004.

HOWARD ACHTSAM
Immigration Judge

APPENDIX B

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B.H. noticed that an agent had marked down her nationality as "Eritrean"—although he had never asked her to state her nationality:

> I asked him "what was that?"
> He said "nationality."
> "Why don't you ask me?" I told him.

He just laughed.

—Testimony to Human Rights Watch

THE HORN OF AFRICA WAR:
MASS EXPULSIONS AND THE NATIONALITY ISSUE
(June 1998 — April 2002)

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ERITREA & ETHIOPIA

THE HORN OF AFRICA WAR: MASS EXPULSIONS AND THE NATIONALITY ISSUE (June 1998 – April 2002)

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I. SUMMARY

A Deportee's Story

Ethiopian nurse B.H. was working for a humanitarian agency in Addis Ababa when war broke out between Ethiopia and Eritrea in May 1999. Then in her mid-fifties, she had lived in Ethiopia's capital all of her adult life. She traced her ancestry to Ethiopia's former province of Eritrea, which won its independence in 1993. She was widowed in 1989 from her Ethiopian husband—who had no Eritrean heritage—after more than twenty years of marriage. She had lived and raised her two children in Ethiopia.

In June 1998, Ethiopia authorities set in motion a campaign to round up, strip of all proof of Ethiopian citizenship, and deport Ethiopians of Eritrean origin from the country. Along with as many as 75,000 others, B.H. was taken into custody, denied her Ethiopian nationality, separated from her children, and deported to a purported homeland with which she had only distant ties.

In Eritrea, parallel roundups of Ethiopian nationals ensued later in the course of the war. B.H. told Human Rights Watch her story in May 1999 in Asmara, Eritrea's capital, where she is still a refugee.

In September 1998 police sought out B.H. at her work in Addis Ababa and took her to the local police station for questioning by a "processing committee." As they asked her questions, the members of the committee took down information. B.H. noticed that an agent had marked down her nationality as "Eritrean"—although he had never asked her to state her nationality:

> I asked him "what was that?"
> He said "nationality."
> "Why don't you ask me?" I told him.

He just laughed.[1]

B.H. said that during her entire ordeal she never doubted that the whole thing was a "terrible mistake" on the part of the Ethiopian authorities. She believed that the expulsion bureaucracy would "soon" discover its mistake and allow her to return to her family; indeed, she said that she patiently waited for that moment to arrive even as she was being transported to the border in a convoy of trucks and buses with 1,500 other deportees.

Five months after her expulsion, B.H. said it was still difficult for her to accept her rejection as an Ethiopian. What was most painful at the time of the interview, however, was her forced separation from her Ethiopian children.

"Expelled—Never to Return"

Ethiopian nurse B.H. and tens of thousands of others were expelled en masse as enemy aliens, in groups of up to thousands at a time. Most were trucked or bussed to the border with Eritrea. Documents proving Ethiopian nationality were confiscated, property rights were cancelled, and travel papers in many instances were marked "Expelled—Never to Return." There was no opportunity for judicial review—or even for appeal of rulings through administrative processes. Thousands were detained for periods from a few days to a few months in difficult conditions; many were ill-treated at the time of their arrest or while in detention awaiting transit to Eritrea. Many endured great suffering while in detention and during grueling journeys to the border.

Denied return to Ethiopia, families like that of B.H. were separated on the discriminatory grounds of ethnic or national origin. Children were either left behind with relatives without Eritrean heritage, or more commonly, even though Ethiopian-

---

[1] Human Rights Watch interview, Asmara, May 13, 1999. The names of all witnesses are on file with Human Rights Watch.

born, expelled with their parents and denied the Ethiopian nationality that was their birthright under Ethiopian law. Although the authorities of independent Eritrea extended the option of Eritrean nationality to those with ties to that country, most of the uprooted retained the hope that they could return to their homes and families in Ethiopia. Reduced to the status of refugees, they confronted the specter of statelessness.

The Ethiopian government also harshly treated Eritreans visiting, working, or studying in Ethiopia whose status as Eritrean nationals—and not Ethiopians—was not in question. They ranged from exchange students studying in Ethiopian universities to officials of state-owned Eritrean companies. Human rights concerns in these cases centered upon treatment in detention, including some cases of torture and persistent patterns of ill-treatment, and the absence of the due process guarantees which should apply even in situations of national emergency.

In Eritrea, a campaign of roundups, detention, and ultimately expulsion of civilians based on ethnicity and nationality paralleled the concerted nation-wide campaign that began in June 1998 in Ethiopia, but began considerably later. Even before authorities began a program of arrest, detention, and expulsion, ordinary Ethiopians living and working in Eritrea's towns and cities were attacked by mobs, sometimes with police participation, in apparent retaliation for Ethiopia's air attacks and battlefield advances. Thousands were subsequently interned in harsh conditions prior to expulsion.

In contrast to Ethiopia's campaign of expulsion, Eritrea did not expel its own citizens. This notwithstanding, Eritrea's roundups and mass expulsion, too, were founded firstly on ethnicity. Individual petitions to remain were not heard; there was no legal redress for those making such claims; and administrative decisions apparently disregarded an individual's personal ties to Eritrea or its citizens. Many of the Ethiopians

held in administration detention or interned faced conditions constituting cruel, inhuman, or degrading treatment, often for as long as several months. Deportees lost all they owned, with little prospect of pursuing claims for lost, confiscated, or abandoned property, although the peace agreement's provision for claims in this regard offer some little hope. The operation was a harsh campaign to expel en masse a suspect population in wartime—with potentially lasting consequences for the future of the once warring neighbors.

The War' Staggering Toll

The war that broke out between Ethiopia and Eritrea in May 1998 shattered illusions that the two countries were to be a locus of stability in the Horn of Africa. The two-and-a-half-year border war claimed a staggering toll in human life and suffering and precipitated violations of human rights and humanitarian law on both sides.

The opposing armies waged a conventional war over a long front for much of the period. The casualties, mainly soldiers, included an estimated 100,000 dead. The conduct of the war devastated the two countries' economies, decimated their draft age youth, displaced whole populations, and led to the flight—or summary deportation—of tens of thousands across the two countries' imperfectly drawn international borders.

Hundreds of thousands were internally displaced and over one million became refugees in the course of the war. Many fled or were deported to other countries in the region as both countries used mass population transfers as a weapon of war. The negotiated end of the war, agreed on December 12, 2000, stopped the fighting—but it failed to resolve the plight of those uprooted from their homes and cut off from their livelihood in both countries, in particular those deported from their own country and stripped of their nationality.

While Ethiopia and Eritrea both now appear to be conforming with the requirements of the peace agreement, the

settlement deals primarily with the formal separation of the belligerents' forces, the demarcation of the border, and competing claims for compensation. The issue of the wartime expulsion of tens of thousands of people on grounds of their purported nationality or national origin garnered surprisingly little attention from the international community during the war and remains largely overlooked in the war's aftermath.

This report examines the use of mass expulsions by both parties to the Horn of Africa war—and their far-reaching human costs.

The Deportations

The Ethiopian government is known to have forcibly expelled an estimated 75,000 people of Eritrean origin during the war. The Eritrean government forcibly expelled or took part in the voluntary repatriation of an estimated 70,000 Ethiopians, notwithstanding persistent Eritrean government claims that it had no expulsion policy comparable to Ethiopia's.

Ethiopia's Campaign of Deportations

Ethiopian authorities launched a vast campaign to round up and expel people of Eritrean origin from Ethiopia in June 1998. Most had been born in Ethiopia when Eritrea was still held to be a part of that country—and had no other recognized citizenship other than Ethiopian. Most adults had spent all or most of their working lives in Ethiopia, outside of Eritrea. Ethiopian authorities in June 1998 announced the planned expulsion of residents who posed a security risk to the state, to include members of Eritrean political and community organizations, and former or current members of the Eritrean liberation front.

The Ethiopian authorities moved almost immediately to carry out arrests and to expel Eritreans and those of Eritrean origin in a manner that became increasingly indiscriminate

over time. No meaningful steps were made to determine "risk" on a case-by-case basis—or to distinguish between those who had formally assumed Eritrean nationality and Ethiopian nationals distinguished only by their Eritrean origin.

The first wave of arrests and deportations began on June 12, 1998, targeting people of Eritrean origin in Ethiopia who were prominent in business, politics, or community organizations. In conjunction with this campaign, the Ethiopian government revoked business licenses and ordered the freezing of assets of thousands of individuals of Eritrean origin. Those with bank accounts were informed that their accounts had been frozen and were inaccessible. The government provided no avenue for affected individuals to challenge these actions. The main targets of the deportation campaign after June 1998 were tens of thousands of ordinary people who were deported and dispossessed on the sole basis of their national origin.

In a June 18 broadcast, Ethiopian Foreign Minister Seyoum Mesfin had already put members of the Eritrean-Ethiopian community on notice that their citizenship was to be put to the test. "[I]f the Eritreans are innocent citizens and if they appeal in unity, if they condemn the aggression . . . [and] raise their voices together with the [Ethiopian] people for the achievement of peace, they will not be under threat."[2] The nationality of Eritrean Ethiopians was not questioned in the foreign minister's statement, but the challenge to their standing as "innocent citizens" posed an immediate threat to the entire group. In practice, the selective expulsions of community and business leaders yielded rapidly to wholesale

[2] "Ethiopian foreign minister explains expulsions," interview broadcast on Ethiopian TV on June 18, 1998, reported in BBC's Summary of World Broadcasts, June 22, 1998

arrests and deportations strictly on the grounds of national origin—on the grounds of presumptive disloyalty.

The expulsion of people from Ethiopia's urban areas generally conformed to a common pattern, with almost all detained and interned prior to being deported—often under very harsh conditions. The majority of the deportees were held for days or weeks, although some were held for as long as several months. A "processing committee" of policemen, security agents, and political officials from the ruling party normally interrogated detainees on their identity, suspected links to Eritrean institutions—and their ownership of property. During the interrogation, the detainees were not given a meaningful opportunity to refute the allegation that they were Eritrean nationals (or security risks), and were denied access to the courts to challenge the legality of their detention or denationalization.

While the detainees were in custody at police stations, officials searched for and confiscated their Ethiopian identification documents, including identity cards, passports, work papers, and driving licenses. Some detainees managed to hold on to some of their identification documents by hiding them—or because they had not had a chance to bring the documents with them when they were detained. The systematic removal or destruction of such documentation was a peremptory measure to deny the individuals concerned basic evidence to substantiate claims to Ethiopian nationality at any future time. This confiscation of documents prior to deportation appears on its face to be recognition of the potential for such documents to counter Ethiopian government claims that it expelled only non-nationals. By stripping deportees of their Ethiopian papers the government was in a sense validating their claims to Ethiopian nationality by foreclosing the option of their close and independent examination.

Prior to their expulsion, the Ethiopian authorities moved urban deportees through a series of increasingly centralized

internment sites holding increasingly larger groups of detainees. The majority of the deportees were transported in bus convoys to the northern border. Conditions during the trip to the border were extremely crowded and uncomfortable. The deportees then were made to cross the border on foot to reach Eritrean posts on the other side. Many others of Eritrean origin fled or were expelled across Ethiopia's southern borders with Djibouti and Kenya. Because of limits on the availability of buses, other equipment, and personnel, the Ethiopian government deported no more than 1,500 people at a time.

Individuals of Eritrean origin who lived in rural areas of Ethiopia were also subject to summary deportation or expulsion. Individuals from those rural villages inhabited predominantly by people of Eritrean origins, mostly in the northern Tigray region, typically had to travel on foot from their villages into Eritrea. They were generally not allowed to take personal possessions with them and some were forced to abandon thousands of livestock.

The Ethiopian government arrested, detained, and deported approximately 75,000 people of Eritrean origin without due process of law. Most were told they being detained because they had voted in the referendum regarding Eritrea's independence—with this cited as evidence they were "Eritreans." Self-identity with others of the same national origin within Ethiopia's multi-ethnic, multi-national state, the essential criterion for voting in the referendum, was reinterpreted as having been an affirmation of citizenship. Membership in Eritrean cultural, social, or political community organizations was also cited as evidence that people of Eritrean ethnicity had lost their Ethiopian nationality. Classification as "Eritrean" and decisions to deport appeared to have been determined by the processing committees even before most individuals were called in for questioning—with a space on forms identifying nationality routinely filled in as "Eritrean"

in advance. The Ethiopian government also forced deportees to sign away their property rights—by demanding deportees sign powers of attorney under threat.

Eritrea's Policy of Internment and Deportation

Eritrea pledged at the outbreak of war that Ethiopian residents would not be penalized for the war, and that they were welcome to stay in the country and to keep their jobs, while offering the option of voluntary repatriation to those wishing to depart. There was no evidence during the first phase of the conflict that Eritrea had a policy to expel Ethiopian residents, although Ethiopian residents suffered considerable abuse. As the conflict dragged on, Eritrea's policy toward Ethiopian residents became increasingly harsh. Thousands had left the country early in the conflict due to economic hardships related to the war and out of concern for their own safety. Increasingly, large numbers of residents were interned and expelled by the Eritrean authorities.

From August 1998 to January 1999, a period of relative calm on the war front, some 21,000 Ethiopian residents of Eritrea left for Ethiopia with the assistance of the International Committee of the Red Cross (ICRC). While Eritrean authorities insisted that these departures were voluntary, a measure of coercion was involved in a number of cases. Indeed, many individuals in this first wave complained upon arrival to Ethiopia of beatings, rape, and the confiscation of their property.

Between February and April 1999, fierce battles were fought on the western and middle segments of the disputed border, but neither party had scored significant gains by the onset of the rainy season in June. However, Ethiopia's retaking of the disputed Badme triangle, on the western front, gave it a certain advantage in the intense propaganda war that the two belligerents fought in the media and on the Internet. During this phase in the war, the Eritrean government ap-

peared to further toughen its policy towards Ethiopians residing in the country, leading to a new wave of internments and forcible expulsions of Ethiopian residents.

The Ethiopian army's major offensive in mid-2000 caused an estimated one-third of Eritrea's three million people to flee their homes. Also displaced were thousands of Ethiopians who had been longtime residents. In the first week of June 2000, Eritrean authorities told Ethiopian citizens living in Asmara "to register with the local authorities in preparation for repatriation." A government spokesman for the foreign ministry in Eritrea denied that the Eritrean government was pursuing a policy of forced repatriation, attributing the directive to a "communication gap," but the interments proceeded anyway. Shortly thereafter, Eritrean authorities acknowledged holding at least 7,500 Ethiopian nationals, and allowed the international press to visit one of several internment sites. Eritrean authorities started expelling larger numbers of Ethiopian residents in earnest in July and August 2000, in several instances without prior information to the ICRC to ensure the safety of deportees as they crossed front lines. The ICRC's request of Eritrea and Ethiopia in early August to agree on common routes for border crossings led to better compliance by the two belligerents with the requirements of safe passage for civilians expelled across the border. Between October 2000 and late 2001, the ICRC accompanied batches of several hundreds of repatriated Ethiopians on a regular basis.

The December 2000 peace agreement established a Claims Commission to decide all compensation claims for loss, damage, and injury related to the conflict and arising from violations of international law. However, monetary rewards alone will be insufficient to compensate for the suffering resulting from the deportations carried out by the two parties. Nor does the Claims Commission appear to be mandated to address the outstanding consequences of the deportations—the nationality status and right to return of those arbitrarily

denationalized and the reunification of families sundered by the mass expulsions.

Overlooking these issues will have grave consequences for thousands of war refugees and displaced persons, many of whom are still living in makeshift settlements and relying for their survival on relief handouts. The peace process has ended the bitter conflict between the two nations. However, the issue of the resettlement or return and the compensation of deportees must be addressed squarely. In particular, the nationality status of those whose citizenship was revoked during the expulsion process must be resolved if lasting peace and reconciliation is to return to the Horn of Africa so that the international peacekeepers can return home.

The War and the Question of Nationality

The war's immediate cause was a border dispute in a dry and stony region called Badme—a consequence of territorial fine-tuning left undone when Eritrea won its independence from Ethiopia in 1993. The final details of the borders then seemed inconsequential, as the leaders of the two governments were fast friends—long-time comrades in arms in the fight against Ethiopia's Derg regime.

The question of the nationality of Ethiopians with ties to newly independent Eritrea was also deferred. Eritrea's newly independent government promptly made provisions for residents of Eritrea and returning refugees to establish their Eritrean nationality and citizenship. Ethiopia's government, for its part, imposed no requirements for Ethiopian citizens of Eritrean origin who remained in Ethiopia to reaffirm their Ethiopian nationality. It did not establish procedures for citizens to choose one or the other nationality, Ethiopian or Eritrean, or to otherwise regularize outstanding nationality issues with its successor state, Eritrea. Indeed, in a 1993 pact with the new Eritrea, Ethiopia recognized that until the issue of citizenship was settled in both countries, rights of resi-

dence in both territories would be respected. Most members of the Eritrean minority in Ethiopia got on with their lives, never doubting their standing as Ethiopian citizens.

Ethiopian law was clear that those who took up the option of Eritrean citizenship could not then have dual nationality—they could not retain their Ethiopian citizenship. Most Ethiopians of Eritrean heritage had a clear right to Eritrean citizenship, and this was a criterion for their voting in the 1993 referendum on Eritrean independence. At that time, however, Eritrea was a province of Ethiopia; an option to formally take up Eritrean citizenship could only be exercised after independence was won. Most of these Ethiopians whose habitual residence was outside Eritrea had not taken steps either to renounce their Ethiopian citizenship or to affirm their citizenship in post-independence Eritrea after the referendum.

Eritrea's independence was contingent upon the outcome of the referendum—and the outcome was promptly recognized by the Ethiopian government. Yet there was no provision in Ethiopian law or in the terms of the referendum itself that expressly put the Ethiopian citizenship of those voting in jeopardy should Eritrea win independence. To have done so would have marred the referendum by threatening to penalize voters who believed in an independent Eritrea. Only long after the fact and in the context of the outbreak of war did Ethiopia's leaders declare that having voted in the referendum was ultimately in itself evidence of Eritrean citizenship—and by extension a renunciation of their rights as Ethiopians. This was the basis for Ethiopia's campaign to strip of their Ethiopian citizenship tens of thousands of people and to expel them en masse to neighboring countries.

International Standards and Successor States

This report focuses on the Ethiopian government's expulsion or deportation from Ethiopia of thousands of Eritreans and Ethiopians of Eritrean origin—and on the Eritrean government's expulsion of tens of thousands of Ethiopians

following the outbreak of war. This account looks at the plight of these uprooted civilians, and in particular those who were expelled by Ethiopian authorities from their own country, their documents stamped "Never to Return."

In the course of the war, both sides violated international standards providing safeguards against arbitrary arrest and restricting the use of administrative detention; barring cruel, inhuman, or degrading treatment or punishment; and forbidding the forcible transfer or deportation of civilian populations. International standards concerning nationality in situations of state succession are less incontrovertible, although certain core principles can be identified. These fundamental standards provide a firm basis to assess the expulsion of people from Ethiopia who had not formally taken up Eritrean citizenship, and as a consequence were rendered potentially stateless.

B.H. and other Ethiopians caught up in the campaign to expel people of Eritrean origin faced many of the same issues confronted in other countries transformed by political upheaval, secession, and the emergence of newly independent states in the 1990s. These were in large part issues of state succession, where one state replaced another in its exercise of sovereignty over a given political territory in conformity with international law. As such, independent Eritrea was a successor state to Ethiopia.

For the successor states emerging from the former Soviet Union and the former Yugoslavia, and the division of Czechoslovakia, as with the secession of Eritrea from Ethiopia, issues of nationality were of the greatest importance—as citizenship has proven essential for the exercise of the full spectrum of human rights. A draft declaration prepared by United Nation's International Law Commission, and submitted to the U.N. General Assembly in 1999, provides useful guidance on the principles of international law relevant to the issue of nationality in successor states.

These principles derive from the basic human right to a nationality, and states' obligations to respect this right. They include the right of those with the nationality of the predecessor state not to be rendered stateless; and the obligation of states to ensure that individuals concerned are informed, within a reasonable time period, of the effect of any new legislation on their nationality. Similarly, the consequences for their status in the predecessor state must be made clear to them should they choose to pursue the option of becoming a national of a successor state.

Of particular relevance to Ethiopia and Eritrea is the principle of nondiscrimination—by which states shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of states by discriminating on any ground. The absence of due process of law in the denationalization and deportation campaign, in turn, flouts principles prohibiting arbitrary decisions concerning the acquisition and withdrawal of nationality—or options to this end. In particular, this violates the principle that people should not be arbitrarily deprived of the nationality of a predecessor state—in this case Ethiopia—or arbitrarily denied the right to acquire the nationality of the successor state. The principles also require that anyone required to transfer one's residence out of the territory of a state following the voluntary renunciation of that state's nationality be given a reasonable time to do so.

International standards are addressed further below.

Methodology

Human Rights Watch closely monitored the treatment of civilians expelled from Ethiopia and Eritrea during and after the war. In May 1999, the organization conducted a three-week mission to the region to gather information about the mass expulsions. Although denied access to Ethiopia, Human Rights Watch interviewed sixty individuals of Eritrean origin

who had been expelled from urban and rural areas in Ethiopia. The interviews were carried out in the Eritrean capital, Asmara, and in an Eritrean-run refugee camp in western Eritrea's Gash-Barka province which sheltered people expelled from rural areas of Ethiopia's Tigray region. Human Rights Watch also interviewed members of the diplomatic community, representatives from local and international humanitarian organizations, representatives from United Nations agencies, and Eritrean government officials on the range of issues covered in this report. Names of those who provided testimonies to Human Rights Watch have been withheld from this report in order to ensure security for them and their family members.

After the outbreak of hostilities between Ethiopia and Eritrea, Human Rights Watch received information about the treatment of Ethiopian residents in Eritrea from Ethiopian government officials as well as nongovernmental organizations and other independent sources. Human Rights Watch also monitored the treatment of Ethiopian nationals inside Eritrea through media reports and contacts on the ground. Human Rights Watch's plans to independently corroborate this information by conducting interviews in Ethiopia with Ethiopian nationals expelled from Eritrea were hampered by the Ethiopian government's refusal to grant entry visas to Human Rights Watch researchers on two occasions: first, in March 1999, and again in April 1999.

Human Rights Watch researchers were able to gather some first-hand testimony about the treatment of Ethiopians in Eritrea during its May 1999 mission to Eritrea. During that mission, Human Rights Watch researchers conducted interviews with a dozen Ethiopian residents and also obtained information from interviews with long-term residents of Eritrea from third countries. The organization also met with the chargé d'affaires of the Ethiopian embassy in Asmara.

This report covers the period June 1998 to April 2002.

of the expellees was killed and seven others were wounded[92] All the expellees, including the wounded, were nevertheless forced into the airplane that brought them back to Ethiopia.[93]

Expulsions from Ethiopia After the December 2000 Peace Agreement

Expulsions from Ethiopia continued after its devastating May 2000 incursion in Eritrea, but gradually decreased over time. During 2000, 911 Eritrean nationals were returned to Eritrea under the auspices of the ICRC delegation in Eritrea.[94] The U.N. secretary-general and the U.N. peacekeering mission in Ethiopia and Eritrea strongly protested the forced expulsion in June 2001 of 704 longtime residents of Eritrean origin from Tigray region to Eritrea. Both expressed concerns about the circumstances in which the expulsions took place, and reminded the Ethiopian government that such actions should be carried out only in accordance with international humanitarian law.[95] The Ethiopian government claimed in its

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[93] The UNHCR formally registered a strong protest with the government of Malawi over the killing of the asylum seeker and the expulsion of twenty-four others to Ethiopia. In a Note Verbale to the Malawian government, UNHCR emphasized the government's obligation under the Refugee Convention to review asylum requests on their merits regardless of how an asylum seeker enters a country as well as to take into consideration the hostilities between Ethiopia and Eritrea when undertaking its asylum review. "UNHCR protests expulsion of Eritreans," and "Malawi: UNHCR protests to Malawi over expulsions," IRIN. UNHCR's protest in this case, which came fourteen months after the start of the Ethiopian expulsion campaign against people of Eritrean origin, was one of the first times the agency spoke out publicly on an issue related to the Ethiopian expulsion campaign.

[94] "ICRC concerned over Ethiopia's forced deportation of Eritreans," Agence France Presse, July 13, 2001.

[95] U.N. Security Council, "Report of the Secretary-General on Ethiopia and Eritrea," S/2001/843, September 5, 2001.

response that the group consisted of persons who had forfeited their Ethiopian citizenship, and had left voluntarily. However, the government promised that this would not happen again.[96]

Ethiopia deported another 312 people of Eritrean origin in November 2001. The group consisted of residents of Addis Ababa who sought "voluntary" deportation to join relatives deported in earlier groups.[97] A group of one hundred people of Eritrean origin were later deported on March 16, 2002, ninety-two of them from the region of Tigray, and eight from Addis Ababa and the surrounding area.[98] Members of the groups deported told human rights investigators of the U.N. peacekeeping mission that they were fleeing discrimination in access to employment and services or seeking to join relatives who had been deported before them.[99]

V. EXPULSIONS BY ERITREA

Shortly after the war broke out, Eritrea proclaimed that Ethiopians were welcome to stay and keep their jobs in the country, while offering the option of voluntary repatriation for those willing to depart. The Ethiopian government has, however, repeatedly charged that Eritrea violated the rights of Ethiopians residing in Eritrea. In particular, Ethiopia has charged Eritrea with arbitrarily expelling thousands of Ethiopian citizens and torturing others. Human Rights Watch documented a number of incidents in which Ethiopian residents were beaten by private individuals, and some incidents

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[96] *Ibid.*

[97] "U.N. Security Council, "Progress Report of the Secretary-General on Ethiopia and Eritrea," S/2001/1194, December 13, 2001.

[98] ICRC, "Ethiopia-Eritrea: Close to 250 People Repatriated," ICRC News 02/12, at <Http://www.icrc.org>, (retrieved March 21, 2002).

[99] U.N. Security Council, "Report of the Secretary-General on Ethiopia and Eritrea," S/2001/843, September 5, 2001, and subsequent quarterly reports in December 2001 and March 2002.

in which police apparently took part in mob attacks. Following the Ethiopian army's major May 2000 offensive, which drove deep inside Eritrea, Eritrea summarily expelled thousands of Ethiopians.

The Official Policy Statement

Following the outbreak of war, the Eritrean government repeatedly gave assurances that Ethiopian residents in Eritrea would not be negatively affected or scapegoated. Nonetheless, by the end of the war, a significant number of Ethiopian residents had left Eritrea. After the May 2000 offensive, the Eritrean government forcibly repatriated thousands of Ethiopian citizens.

The Eritrean government announced its intent not to retaliate against Ethiopian citizens in a June 26, 1998 resolution of the National Assembly:

> The National Assembly has asserted that in contrast to the inhumane policy of the Ethiopian government, the Eritrean government has not, and will not, take any hostile action against Ethiopians residing in the country. Their right to live and work in peace is guaranteed. If this right is infringed under any circumstances or by any institution, they have the full right of redress. This policy that can see a horizon beyond the conflicts of today will not change even if the current crisis deteriorates to any degree.[100]

Status of Ethiopians in Eritrea

The legal status of Ethiopian residents in Eritrea who had not sought Eritrean nationality at the time of the war's outbreak does not appear to be in dispute. The Eritrean government as a rule considered them as aliens. It did not automatically issue the Eritrean national identity card or

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[100] Statement of the 11th Session of the National Assembly of Eritrea, Asmara, June 26, 1998.

passport to these Ethiopians nor did it recruit them for employment reserved for nationals. Ethiopians were also not called up for military service in Eritrea. For the purposes of residency and departure procedures, the Eritrean government continued to deal with Ethiopian nationals under the normal institutions and procedures governing aliens residing in the country, i.e. they were required to acquire residency permits and obtain exit visas to leave the country.

As aliens, Ethiopians living in Eritrea were protected by a range of human rights instruments, and during the war they were also protected by the Fourth Geneva Convention. Although the Eritrean government acceded to the Geneva Conventions only in July 2000, it was previously bound to observe them as a successor state to Ethiopia by Ethiopia's standing as a party to the Geneva Conventions.

The Eritrean government did not set up special administrative or judicial institutions like the deportation committees in Ethiopia. During the initial phase of the war, diplomats, representatives of international organizations and agencies, and several independent observers concurred in interviews with Human Rights Watch in Asmara that there was no government-sponsored retaliation against Ethiopian residents in Eritrea.[101] However, the situation gradually changed as the conflict unfolded, with Eritrean authorities forcibly interning and expelling increasing numbers of Ethiopian residents.

Early Exodus and Expulsions (June 1998-February 1999)

During a meeting with Human Rights Watch in New York on February 18, 1999, Fesseha Yimer, Ethiopia's ambassador and permanent representative to the United Nations at Geneva, charged that the absence of an official policy and special judicial or administrative measures aimed at forcibly

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[101] Human Rights Watch interviews, Asmara, May 1999.

deporting Ethiopians from Eritrea was deceptive. He claimed that the Eritrean government made life in Eritrea impossible for Ethiopians by condoning their dismissals from public sector jobs as well as their eviction from rental residences.[102]

An estimated 100,000 Ethiopian citizens lived in Eritrea prior to the 1998 war, primarily migrant laborers from the neighboring Tigray region and longtime residents working in three main centers of economic activity in Eritrea: the capital Asmara and the two port cities of Massawa and Assab. In Assab, the port city through which the bulk of Ethiopian imports traveled before the war, Ethiopian citizens made up approximately 60 percent of the city's population of 35,000 in 1998. With the outbreak of war in May 1998, Ethiopia boycotted both Assab and Massawa, and diverted its maritime traffic to the port of Djibouti to the south. But even prior to the war, the flow

* * * *

[102] Meeting at Human Rights Watch with Ambassador Yimer and Counselor Berhanemeskel Nega, Permanent Mission of Ethiopia to the U.N., February 18, 1999.

APPENDIX C

QUESTION & ANSWER SERIES

ERITREA & ETHIOPIA: LARGE-SCALE EXPULSIONS
OF POPULATION GROUPS
AND OTHER HUMAN RIGHTS VIOLATIONS
IN CONNECTION WITH THE
ETHIOPIAN-ERITREAN CONFLICT,
1998-2000

[QA/ERUETH/02.0011

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DISCLAIMER

The July 27, 1990 Regulations, "Aliens and Nationality: Asylum and Withholding of Deportation Procedures," mandated the creation of a new corps of Asylum Officers to provide an initial, nonadversarial adjudication of asylum claims. Asylum Officers use asylum law, interviews with asylum applicants, and relevant information on country conditions to determine the merits of individual claims for asylum. As specified in the Regulations (8 CFR 208.12), as amended, such information may be obtained from "the Department of State, the Office of International Affairs, other Service offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions."

Question and Answer series reports are one means by which information on human rights conditions in a country and/or conditions affecting given groups or individuals deemed "at risk" within a given country is presented to Asylum and Immigration Officers. These reports are descriptions of conditions in countries based on information provided by the sources referred to above. They are prepared by expert consultants and/or the staff of the Resource Information Center (RIC), Immigration and Naturalization Service (INS), U.S. Department of Justice (DOJ). This report was researched and written by an expert consultant, Hugh Byrne.

Question and Answer reports cannot be, and do not purport to be, either exhaustive with regard to the country surveyed, or conclusive as to the merits of any particular claim to refugee status or asylum. The inclusion of this report in the Question and Answer Series compiled by the Service does not constitute an endorsement of the information in the report. *The views expressed in the report, therefore, do not necessarily represent statements of policy of the United States Government, nor does this report reflect foreign policy concerns of the United States Government.*

Research for this paper was completed on 20 September 2000.

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A Note on Terminology

A major focus of this Question and Answer Series on the Ethiopian-Eritrean conflict is the removal from Ethiopia of thousands of Eritreans and Ethiopians of Eritrean origin (and also, in the aftermath of the signing of a ceasefire agreement between the two nations in mid-2000, the forcible removal of Ethiopians from Eritrea). The term used in much of the analysis and reporting of these removals of large numbers of people is "deportation." However, deportation connotes a legal process by which a person is required to leave a country. ("Deportation": 1. "the lawful expulsion of an undesired alien or other person from a state," *Random House College Dictionary*, 1975.) The overwhelming evidence in the case of removal of Eritreans from Ethiopia (and, more recently, in the removal of smaller numbers of Ethiopians from Eritrea) points to the absence of any form of due process in the removals. It would appear more accurate, therefore, to use the term "expel/expulsion" to describe these activities and (except where the language of "deportation" is used in the original source) this is the terminology that will be used in this report.

I. FOREWARD

In the period since research for this paper was completed (September 2000), there have been a number of important developments in the relationship between Ethiopia and Eritrea and its implications for the people of both countries.

Ethiopia and Eritrea signed a final peace agreement on 12 December 2000. This agreement called for the freeing of political prisoners and others detained; an investigation of the causes of the conflict; the creation of a commission to investigate claims of loss or damage from those who had suffered as a result of actions of either government; and the creation of a neutral commission to demarcate the boundaries between the two nations.

Despite continuing tensions between the two governments, both parties have taken steps to implement the December 2000 peace agreement. A temporary security zone was established in the disputed border region and both sides have released political prisoners, though hundreds of others still remain in camps. By September 2001, 2,659 civilian Eritreans and 21,072 Ethiopians had been repatriated under the auspices of the International Committee of the Red Cross (ICRC)[1]; and 170,000 Eritrean internally displaced persons (IDPs) had returned to their villages, though 70,000 IDPs were still living in temporary camps.[2]

Finally, in an apparently serious violation of the peace agreement, the Ethiopian government deported 722 Eritreans from Ethiopia in late June 2001, which, according to the ICRC, "was the first involuntary repatriation since the two countries signed an accord to end their border war."[3]

II. BACKGROUND

In May 1998, an intense border conflict broke out in the Horn of Africa between Ethiopia and Eritrea. The hostilities surprised most analysts and close observers because the current rulers of both nations had fought side-by-side to overthrow the Ethiopian military regime of Mengistu Haile Mariam in 1991 and had maintained seemingly amicable relations in the subsequent years.[4]

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[1] "Ethiopia: Release of POWs Halted," *Africa News* (12 September 2001)—as reported on NEXIS.

[2] "Ethiopia: Many Internally Displaced Persons Still in Camps, says Report," *Africa News* (11 September 2001)—as reported on NEXIS.

[3] "ICRC concerned over Ethiopia's forced deportation of Eritreans," *Agence France Presse* (12 July 2001)—as reported on NEXIS.

[4] Prunier, Gerard. November 1998. "The EthioEritrean Conflict: An Essay in Interpretation," UNHCR Refworld, WRITENET Country Papers (November 1998). [Internet] URL: <http://www.unhcr.ch/refworld/country/writenet/wrieri02.htm> [Accessed on 27 May 2000].

The conflict has cost tens of thousands of lives of combatants in warfare reminiscent of World War One.[5] Well over a million people have been forced from their homes by the conflict.[6] The two nations, among the ten poorest on earth, have multiplied their spending on arms, and 250,000 troops faced each other on either side of the border.[7]

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[5] Last, Alex. "Eritrea: 'A Forgotten War', "British Broadcasting Corporation News Online (World) (London: 22 July 1999). [Internet] URL: <http://news.bbc.co.uk> [Accessed on 30 May 2000]; "Africa's Forgotten War," The Economist (London: 8 May 1999). [Internet] URL: <http://www.economist.com/archive> [Accessed on 5 June 2000].

[6] United Nations High Commission for Refugees. "Refugees Daily" (22 May 2000). [Internet] URL: <http://www.unhcr.ch/refworldfcgi-bin/newscountry.prcountry-ethiopia)> [Accessed on 5 June 2000]; "Global Hot Spots: Ethiopia-Eritrea," Policy.com (Washington, DC: 29 May 2000). [Internet] URL: <http://www.policy.com/hotspots/detail754.html> (Accessed on 4 June 2000]; following the intensive fighting in mid-2000, the United Nations High Commission for Refugees estimated that one million Eritreans had been internally displaced as a result of the conflict, 90-95 percent of them women. United States Agency for International Development. "Eritrea—Humanitarian Crisis Fact Sheet #1, Fiscal Year (FY) 2000" (11 September 2000). [Internet] URL: <http://www.reliefweb.int/w/rwb/nsf/80fa873b88bbc3c12564f6004c8ad5/> [Accessed on 4 June 2000]; and the United Nations reported that "the Ethiopian government estimated that 349,837 people were displaced from the conflict area in the northern areas of Tigray and Afar as a result of the conflict," including those who had been returned from Eritrea since the start of the fighting. United Nations Country Team in Eritrea. "Updated Appeal for Rehabilitation and Recovery Programmes for Internally Displaced Persons in Ethiopia" (22 August 2000). [Internet] URL: <http://www.reliefweb.int/w/rwb/nsf/> [Accessed on 12 September 2000].

[7] "Global Hot Spots: Ethiopia-Eritrea," Policy.com (Washington, DC: 29 May 2000). [Internet] URL: <http://www.policy.com/hotspots/detail754.html> [Accessed on 4 June 2000]; Alex Last. "Eritrea: 'A Forgotten War'," British Broadcasting Corporation News Online (World) (London: 22 July 1999). [Internet] URL: <http://news.bbc.co.uk> [Accessed 30 May 2000]; Amnesty International. "Ethiopia and Eritrea: Human Rights Issues in a Year of Armed Conflict" (London: Amnesty International: 21 May 1999), p. 6. [Internet] URL: http://www.amnesty.org/ailib/aipub/

Following the outbreak of hostilities, Ethiopian authorities began detaining and expelling Eritreans and Ethiopians of Eritrean origin. Over 60,000 have been expelled; families have been split up, and the property of many of those forced to leave has been auctioned, while the situation of those of Eritrean origin still in Ethiopia is tenuous. There are also recent reports of the detention of Ethiopians in Eritrea,[8] accusations of atrocities committed against detained Ethiopians, claims that up to 10,000 Ethiopian men remained in detention in July 2000,[9] reports that Eritrea has also resorted to the forced repatriation of Ethiopians with the expulsion of 92 women from the Red Sea port of Assab to the coast of Djibouti in mid-July,[10] and documented reports of large-scale expulsions of Ethiopians from Eritrea[11] since the signing in mid-June 2000 of a fifteen-point Organization of African Unity (OAU) plan to end the conflict.[12] In September 2000

1999/AFR/16400099.htm> [Accessed on 4 June 2000].

[8] Nelson, Craig. "Ethiopians Feel Safer in Camp," *Associated Press*, AP Online (6 June 2000)—as reported on NEXIS.

[9] Bhalla, Nita. "Ethiopian Refugees' Atrocity Tales," *British Broadcasting Corporation News, World: Africa* (London: 7 July 2000). [Internet] URL: <http://news.bbc.co.uk> [Accessed on 8 July 2000].

[10] "Eritrea Deports Ethiopian Women to Djibouti Coast," *Agence France Presse* (Paris: 17 July 2000)—as reported on NEXIS.

[11] "Ethiopia, Eritrea Urged to Settle on Route for Returning Refugees," *Xinhua News Agency* (8 August 2000), reporting a statement from the International Committee of the Red Cross (ICRC) that 2,700 Ethiopians were sent from a camp 65 kilometers north of Asmara and dropped off 40 kilometers from the front line and had to walk for 18 hours before reaching the border—as reported on NEXIS; and, "Red Cross Reports that Eritrea Forcibly Deporting Ethiopians," AP Worldstream (10 August 2000)—as reported on NEXIS.

[12] "Ethiopia Accepts Peace Accord," Associated Press (14 June 2000) —as reported on NEXIS; "Ethiopia-Eritrea Peace Plan," *British Broadcasting Corporation News, World: Africa* (London: 12 June 2000). [Internet] URL: <http://news.bbc.co.uk/hitenglish/world/africa/newsid 787000/787602.stm> [Accessed on 14 June 2000].

the ceasefire was still in force, and a United Nations fact-finding mission had visited Eritrea and Ethiopia to assess the situation on the ground in preparation for the arrival of a 4,000-strong peacekeeping force to separate the two armies.[13]

The two nations have a complex history and relationship. Eritrea became a political entity when it was occupied by Italy from 1890 to 1941. It was under British Administration from 1941 to 1952 and then was federated with Ethiopia from 1952 until the Ethiopian Emperor Haile Selassie annexed Eritrea and made it a province of Ethiopia in 1962. An armed struggle for independence developed from the early 1960s, first against Emperor Selassie and then against the military regime led by Mengistu Haile Mariam that took power in 1974.[14] The movement that defeated the Mengistu regime was led in Eritrea by the Eritrean People's Liberation Front (EPLF) which drew the bulk of its support from the Tigrean people who are predominantly Eastern Orthodox Christian and speak the Tigrinya language. The EPLF were allies of the Tigray People's Liberation Front (TPLF) from Ethiopia—that also largely drew its support from the Tigrean ethnic group—and the efforts of both were instrumental in the defeat of Mengistu's forces in 1991. Following an April 1993 referendum, supported by the new Ethiopian government, Eritrea declared independence in May 1993)[15]

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[13] "UN Fact-finders Visit Eritrea," *British Broadcasting Corporation News, World.' Africa* (London: 7 July 2000). [Internet] URL: <http:// news.bbc.co.uk> [Accessed on 8 July 2000].

[14] *The Europa World Year Book, 1998.* 39th ed. (London: Europa Publications:1998), p. 1255.

[15] "Referendum '93: The Eritrean People Determine Their Destiny," *Report of the Referendum Commissioner of Eritrea,* (Trenton, NJ: The Red Sea Press Inc.: August 1993); de Waal, Alex. "Rethinking Ethiopia," in Charles Gurdon (ed.) *The Horn of Africa,* (New York: St. Martin's Press: 1994), p. 26; Fukui, Katsuyoshi; Markakis, John. *Ethnicity and Conflict in the Horn of Africa* (London: James Currey Ltd. and Athens:

Eritrea has a population of about 3.9 million, 83 percent of which is rural. About half the population (mainly in the north) is Orthodox Christian; and about half (mainly in the south) is Muslim. There are nine ethnic groups, the largest of which is the Tigray, who make up about half the Eritrean population and provided the leadership of the independence movement.[16] Since independence in 1993, Eritrea's leaders have sought to create a unitary state and to minimize the importance of ethnicity and religion in the politics of the nation.[17]

Modern Ethiopia, a country of about 61.7 million people,[18] achieved its independence following the defeat of Italian forces in 1913. About 45-50 percent of the population (mainly in the south) is Muslim, and 35-40 percent Orthodox Christian. There are some 70-80 ethnic groups in the country, with the Oromo (about 40 percent), Amhara (about 30 percent), Tigray (about 14 percent), and Somali (3-4 percent) groups being the four largest.[19] The struggle against the Mengistu regime was led by the Tigrayan people of northern Ethiopia under the leadership of the TPLF, who mobilized

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Ohio University Press: 1994), p. 229; Prunier, Gerard. "The EthioEritrean Conflict: An Essay in Interpretation," UNHCR Refworld, WRITENET Country Papers (November 1998). [Internet] URL: <httn://www.unhcr.ch/refworld/country/writenet/wrieri02.htm> [Accessed on 27 May 2000].

[16] Levinson, David. *Ethnic Groups Worldwide: A Ready Reference Handbook* (Phoenix, AZ: Oryx Press: 1998), p. 130; *The Europa World Year Book*, 1998. 39th ed. (London: Europa Publications: 1998), p. 1255.

[17] Ottaway, Marina. *Africa's New Leaders: Democracy or State Reconstruction*. Carnegie Endowment for International Peace (Washington, D.C.: Brookings Institution Press: 1999), p. 54.

[18] U.S. Department of State. "Ethiopia," *Country Reports on Human Rights Practices for 1999—Volume I* (Washington, DC: U.S. Government Printing Office: 25 February 2000), p. 183. [Internet] URL: <http://www.state.gov/www/global/human rights/1999 hrp report/ethiopia.html> [Accessed on 4 June 2000].

[19] Levinson, David. *Ethnic Groups Worldwide: A Ready Reference Handbook* (Phoenix, AZ: Oryx Press:1998), pp. 131-132.

effectively among Tigrayan peasants. By the late 1980s the TPLF had inflicted major defeats on the Ethiopian military in close alliance with the EPLF of Eritrea, and the TPLF took power in Ethiopia in 1991. A referendum in Eritrea brought that nation independence in 1993.

Once in power, the TPLF sought to broaden its support beyond the Tigrean people and founded other ethnically based political parties to form the Ethiopian People's Revolutionary Democratic Front (EPRDF). The EPRDF has taken a very different approach to the "ethnic" question than has its counterpart in Eritrea—setting up an ethnically based federation of nine regions, with the major ethnic groups having substantial autonomy within their "own" region, while major political and economic power is still held by the central government.[20]

While Ethiopian Prime Minister, Meles Zenawi and Eritrean President, Isaias Afeworki have been portrayed as a new younger generation of African leadership that held out hope for the solution of some of the continent's major problems, neither nation fully fits the description of a democracy.[21] One analyst presents Eritrea as having a political system where "mobilization . . . has taken precedence over democratic participation" while in Ethiopia there is the

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[20] Ottaway, Marina. "Africa's New Leaders: African Solution or African Problem?"*Current History* (Philadelphia: Vol. 97, No. 619: May 1998), pp. 210-211; Prunier, Gerard. "The EthioEritrean Conflict: An Essay in Interpretation," UNHCR Refworld, WRITENET Country Paper (November 1998). [Internet] URL: <http://www.unhcr.ch/refworld/country/writenet/wrieri02.htm> [Accessed on 27 May 2000]; Ottaway, Marina. *Africa's New Leaders: Democracy or State Reconstruction.* Carnegie Endowment for International Peace (Washington, D.C.: Brookings Institution Press: 1999), pp. 65-82; de Waal, Alex. "Rethinking Ethiopia," in Charles Gurdon (ed.) *The Horn of Africa* (New York: St. Martin's Press: 1994), pp. 28-36.

[21] Ottaway, Marina. "Africa's New Leaders: African Solution or African Problem?" *Current History* (Philadelphia: Vol. 97, No. 619: May 1998), p. 209.

presence of "democratic form without democratic content."[22] In each nation, prior to the outbreak of the border conflict, serious human rights violations persisted though apparently on a lesser level than under previous regimes.

The current conflict between Ethiopia and Eritrea had its origin in disputes over economic issues—following Eritrea's introduction of a new currency, the *nakfa*, in 1997 and its desire for it to trade at parity with the Ethiopian *birr*, and Ethiopia's demand that transactions over $250 be conducted in US dollars, as well as growing tensions over the location of the border between the two nations.[23] The border dispute erupted following land conflicts between former Ethiopian guerrillas who moved into the Badme region and Eritrean farmers who were already there. In 1997, Ethiopian forces displaced Eritrean administrators and Ethiopia published a map that claimed most of the Badme region as Ethiopian. In May 1998, Eritrean troops seized areas beyond the disputed territories and the conflict exploded into full-scale war.[24]

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The evidence is that the political leadership that ordered the expulsion of Eritreans is largely from the Tigrean ethnic group, "about two-thirds of the EPRDF fighters are TPLF [a fundamentally Tigrean organization]; and the same is true of

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[22] Ottaway, Marina. *Africa's New Leaders: Democracy or State Reconstruction*. Carnegie Endowment for International Peace (Washington, D.C.: Brookings Institution Press:1999), pp. 53 and 77.

[23] Cornwall, Richard. "Africa Watch: Ethiopia and Eritrea: Fratricidal Conflict in the Horn," *African Security Review* (Pretoria, South Africa: Institute for Security Studies: Vol. 7, No. 5, 1998). [Internet] URL: <http://www.iss.co.za/Pubs/> [Accessed on 28 May 2000].

[24] Smyth, Frank. "Africa's Horn War," IntellectualcapitaLcom (29 April 1999). [Internet] URL: <http://www.intellectualcapital.com/issues/issue225/item4237.asp> [Accessed on 29 May 2000].

the political leadership,"[36] and the bulk of those directing the detentions and deportations were Tigrean according to an Eritrean study.[37] Moreover, since there is no evidence that the expulsions were specifically directed against non-Tigrean Eritreans, it can be reasonably inferred that the expulsions were directed either against Eritreans in general (of whatever ethnic group they might be)—which would be targeting based on nationality rather than ethnicity—or against Tigrean Eritreans—which would be Tigreans violating the rights of other Tigreans—more akin to the "family affair," cited above from Prunier.

Clearly, ethnicity is a major element in Ethiopian politics and in the expulsions—taking such action against Eritreans (including people from the same Tigrean ethnic group as the Ethiopian leaders themselves) allows the TPLF/EPRDF leaders to consolidate support among other ethnic groups (the Amhara, particularly) and present themselves as a truly "national" leadership.[38] But this does not make the expulsions into "ethnic cleansing" or turn the nine ethnic groups in Eritrea into one "ethnic Eritrean." From the standpoint of clarity and objectivity, it would hence appear more helpful to use the term "Eritreans and Ethiopians of Eritrean origin" in describing those expelled from Ethiopia rather than "ethnic Eritreans."

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[36] de Waal, Alex. "Rethinking Ethiopia," Charles Gurdon (ed.) *The Horn of Africa* (New York: St. Martin's Press: 1994), p. 29.

[37] Legesse, Asmarom. *The Uprooted: A Scientific Survey of Ethnic Eritrean Deportees from Ethiopia Conducted with Regard to Human Rights Violations* (22 February 1999), p. 36. [Internet] URL:<http://www.primenet.corn/—ephrem2/1egesse/uprooted2.html>[Accessed on 29 May 2000].

[38] "Africa's Forgotten War," *The Economist* (London: 8 May 1999). [Internet] URL: <http://www.economist.com/archive>[Accessed on 5 June 2000].

IV. THE 1993 REFERENDUM ON ERITREAN INDEPENDENCE

The 1993 referendum on Eritrean independence resulted from the defeat of the Mengistu military regime by the Eritrean People's Liberation Front (EPLF) that fought to free Eritrea from Ethiopian domination; and the Tigrean People's Liberation Front (TPLF) that led the struggle of the Ethiopian opposition to the Mengistu regime and is now a core of the leadership of the current Ethiopian government. According to Gerard Prunier, senior researcher at the National Center for Scientific Research in Paris, the two parties secretly agreed in 1988 that once Mengistu was overthrown:

> . . . the TPLF would assume power in Addis Ababa and accept a referendum on independence in Eritrea. The agreement was . . . perfectly adhered to. The referendum was held in Eritrea in 1993 and the new Ethiopian regime immediately recognized the independence of its former province.[39]

Registration to vote in the 1993 referendum was tied to verification of Eritrean nationality; and establishment of nationality and registration to vote took place in tandem. To be eligible to vote, a person had to be an Eritrean as defined by the Nationality Law of Eritrea (Proclamation No. 21/1992). To be an Eritrean national a person had to be born to a father or mother of Eritrean origin--which was defined as a person who was resident in Eritrea in 1933. Nationality could also be established "by naturalization" for those who entered and resided in Eritrea between 1934 and 1951 and with greater restrictions (including ability to speak an Eritrean language, being domiciled for ten years in Eritrea before

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[39] Prunier, Gerard. "The EthioEritrean Conflict: An Essay in Interpretation," UNHCR Refworld, WRITENET Country Papers (November 1998), p. 1. [Internet] URL: <http://www.unhcr.ch/refworld/country/writenet/wrieri02.htm> [Accessed on 27 May 2000].

1974, and having the intention to be permanently domiciled in Eritrea) for those entering and residing in Eritrea after 1952.[40] "All Eritreans were eligible to register to vote at designated places in Eritrea or abroad" and in order to register, they had to produce a valid Eritrean nationality (ID) card, be over eighteen and without a criminal conviction.[41] In order to receive an Eritrean nationality card, a person claiming to be entitled to vote in the 1993 referendum had to fill out a detailed form and give information on current residence; religious affiliation; details on parents and grandparents; specify the basis on which s/he was claiming Eritrean nationality; and provide three people of Eritrean citizenship who would testify to the authorized official that the person was who s/he claimed to be and that the statements made were true. The statements of the witnesses had to be signed before the authorized official. Registration forms for applicants outside of Eritrea were processed through the provisional government's offices in major cities. Individuals were appointed in different communities to be responsible for distributing and collecting the forms, publicizing the election, and finding appropriate places for the voting to take place. (In Washington, DC, for example, referendum voting took place in the gymnasium/auditorium at American University.) In Addis Ababa and other towns within Ethiopia the Ethiopian government supported the carrying out of the referendum, for example by allowing schools to be used for balloting.[42]

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[40] "Referendum '93: The Eritrean People Determine Their Destiny," *Report of the Referendum Commissioner of Eritrea* (Trenton, NJ: The Red Sea Press Inc.: August 1993), pp. 118-122.

[41] "Referendum '93: The Eritrean People Determine Their Destiny," *Report of the Referendum Commissioner of Eritrea* (Trenton, NJ: The Red Sea Press Inc.: August 1993), pp. 23-24.

[42] Vicky Rentmeesters. Information Officer, Embassy of Eritrea (Washington, DC)]. Telephone interview (12 September 2000).

There was just one question on the ballot: "Do you approve Eritrea to become an independent and sovereign state?"[43]

The total number of registered voters in the referendum was 1,173,706. Of this number, 1,156,280 participated in the voting. 99.8 percent of those voting cast a 'yes' vote. 57,710 persons resident in Ethiopia voted in the 1993 Eritrean referendum on independence—57,466 (99.5%) voted 'yes'; 204 voted 'no; and 40 ballots were invalid. The United Nations sent a mission to Eritrea to observe the elections and found them to have been "free and fair at every stage."[44]

Following the outbreak of conflict between Ethiopia and Eritrea in May 1998, the question of who voted in the 1993 referendum became a critical issue in the expulsion process and in the mutual recriminations between the two states—though it had not been an issue in the previous five years. One of the questions most frequently asked of potential deportees was "Did you vote in the 1993 referendum?"[45] An

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[43] "Referendum '93: The Eritrean People Determine Their Destiny," *Report of the Referendum Commissioner of Eritrea* (Trenton, NJ: The Red Sea Press Inc.: August 1993), p. 183.

[44] "Referendum '93: The Eritrean People Determine Their Destiny," *Report of the Referendum Commissioner of Eritrea* (Trenton, NJ: The Red Sea Press Inc.: August 1993), p. 183, 188 and 193.

[45] Klein, Natalie S. Mass Expulsion from Ethiopia: Report on the Deportation of Eritreans and Ethiopians of Eritrean Origin from Ethiopia, June-August, 1998 (Connecticut: Yale School of Law: 1999). [Internet] URL: <http://www.primenet.com/~ephrem2/newscom2/Klein.html> [Accessed on 19 November 1999]; Legesse, Asmarom. The Uprooted: A Scientific Survey of Ethnic Eritrean Deportees from Ethiopia Conducted with Regard to Human Rights Violations (22 February 1999), p. 25. [Internet] URL: <http://www.primenet.com/-ephrem2/legesse/uorooted 2.html> [Accessed on 29 May 2000]; United Nations Development Programme (Asmara, Eritrea). "Update on Deportees: 12-19 July 1998" (19 July 1998), p. 7. [Internet] URL: <http://www.primenet.com/-ephrem 2/newscom2/UNDP.html> [Accessed on 28 May 2000].

affirmative answer was sufficient basis for expulsion in the eyes of Ethiopian authorities.

The Ethiopian government argued that the individuals who were expelled were citizens of Eritrea rather than Ethiopia because they registered to vote in the 1993 referendum and thereby renounced their Ethiopian citizenship—since, the Ethiopian authorities claimed, registration to vote connoted acceptance of Eritrean citizenship and Ethiopia does not permit dual citizenship. Both governments, the Ethiopian authorities argued, recognized that participation in the referendum signified acceptance of Eritrean citizenship long before the current conflict began; and thus Ethiopia had a legal right to deport Eritreans deemed to be a risk to national security because "they are citizens of a foreign country."[46]

Amnesty International argued that:

> Although those expelled had identity cards, which entitled them to vote in the referendum, and were entitled to take up Eritrean citizenship if they wished, they had not formally done so, and so had not formally renounced their Ethiopian citizenship.[47]

The human rights group concluded that the "removal of Ethiopian citizenship and expulsion of people of Eritrean origin is a clear breach of international law."[48]

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[46] Government of Ethiopia. "Eritrea's Baseless Accusations" (9 July 1999). [Internet] URL: <htto://www.ethiospokes.net/News/Releases/July99/r0907991.htm> [Accessed on 28 May 2000].

[47] Amnesty International. "Ethiopia and Eritrea: Human Rights Issues in a Year of Armed Conflict." (London: Amnesty International: 21 May 1999), pp. 15-16. [Internet] URL: <httn://www.amnesty.org/ailib/aipub/1999/AFR/16400099.htm> [Accessed on 4 June 2000].

[48] Amnesty International. "Ethiopia and Eritrea: Human Rights Issues in a Year of Armed Conflict." (London: Amnesty International: 21 May 1999), pp. 15-16. [Internet] URL: <http://www.amnesty.org/ailib/aipub/1999/AFR/16400099.htm> [Accessed on 4 June 2000].

Natalie S. Klein in her study of the forced expulsions argued that:

> . . . at no point during the independence process was it suggested that persons whose family traced its roots to the Eritrean part of Ethiopia would automatically lose their legal status as Ethiopian citizens simply by virtue of the fact that Eritrea became an independent state. Neither was it ever suggested that the price of participating in the independence referendum was an automatic loss of Ethiopian citizenship.[49]

Thus, there "is no legal basis for any Ethiopian government claim that it is 'foreigners' who are being deported."[50]

An assessment from Human Rights Watch, confronting the Ethiopian government's argument that only those who had opted for Eritrean citizenship were eligible to vote in the referendum, argued that "such a choice would have been contingent upon, and meaningful only after being ratified by each individual after Eritrea had gained independence." Moreover, "Ethiopian authorities failed to declare at the time of the referendum that participation in it would constitute a formal renunciation of Ethiopian nationality." Those persons expelled were thus "being retroactively punished for an act

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[49] Klein, Natalie S. Mass Expulsion from Ethiopia: Report on the Deportation of Eritreans and Ethiopians of Eritrean Origin from Ethiopia, June-August,1998 (Connecticut: Yale School of Law: 1999), p. 9. [Internet] URL: <http://www.primenet.com/~ephrem2/newscom2/Klein.html> [Accessed on 19 November 1999].

[50] Klein, Natalie S. Mass Expulsion from Ethiopia: Report on the Deportation of Eritreans and Ethiopians of Eritrean Origin from Ethiopia. June-August, 1998 (Connecticut: Yale School of Law: 1999), p. 9. [Internet] URL: <http://www.primenet.com/~ephrem2/newscom2/Klein.html> [Accessed on 19 November 1999].

that the Ethiopian government had at the time facilitated and encouraged."[51]

V. EXPULSION OF PEOPLE OF ERITREAN ORIGIN OR HERITAGE FROM ETHIOPIA

In June 1998, Ethiopian authorities began expelling people of Eritrean origin or heritage from Ethiopia to Eritrea, following the outbreak of a border conflict between the two nations on 6 May 1998. Amnesty International reported that:

> On 12 June 1998, the government of Ethiopia announced that officials of the Eritrean government and ruling party were required to leave the country. The government also announced that individual Eritreans found spying and mobilizing financial resources to support Eritrea in its war with Ethiopia would be expelled and sent to Eritrea. At the time of the announcement the government estimated that this affected 1,045 Eritreans. On 11 July 1998, Ethiopia announced that another 1,000 Eritreans would be expelled for the same reasons of national security.[52]

Ethiopian government statements emphasized that the expulsions were focused on those who were deemed a security risk because they were former Eritrean People's Liberation Front (EPLF) combatants, functionaries of the EPLF office and other party interests in Addis Ababa or individuals engaged in spying and those "contributing financial and material support to Eritrea's war effort."[53]

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[51] Human Rights Watch. *World Report 2000.* (New York, Washington, London, Brussels: Human Rights Watch: 1999), p. 44.

[52] Amnesty International. "Ethiopia and Eritrea: Human Rights Issues in a Year of Armed Conflict" (London: Amnesty International: 21 May 1999), p. 13. [Internet] URL: <http://www.amnesty.org/ailib/aipub/ 1999/ AFR/16400099.htm> [Accessed on 4 June 2000].

[53] "Ethiopian Foreign Minister Explains Deportations," *British Broadcasting Corporation News Online (World)* (London: 22 June 1998).

Between June 1998 and February 1999 when hostilities resumed, a total of 54,000 people of Eritrean origin were detained and expelled, according to Amnesty International. Orders for

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[Internet] URL: <http://news.bbc.co.uk/low/enalish/world/monitoring/newsid 117000/117379.stm> [Accessed on 29 May 2000].